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CALHOUN COUNTY v BLUE CROSS BLUE SHIELD OF MICHIGAN

Docket No. 303274. Submitted May 2, 2012, at Lansing. Decided June 5, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 917.

Calhoun County brought an action in the Calhoun Circuit Court against Blue Cross and Blue Shield of Michigan, the administrator of its self-insured health care plan, in connection with what the parties termed an "access fee" that defendant charged plaintiff to cover the costs of an insurance subsidy that defendant was legally obligated to provide to certain Medicare-eligible people. The five-count complaint—which alleged two counts of breach of contract and one count each of breach of fiduciary duty, conversion, and constructive fraud—asserted that plaintiff had not agreed to pay the access fee, that the access fee had been fraudulently concealed, and that the access fee was unenforceable because the amount charged was not specified, determinable, or reasonable. The court, James H. Fisher, J. (sitting by assignment), initially denied both parties' motions for summary disposition but, on reconsideration, granted plaintiff's motion for summary disposition with respect to one count of breach of contract and the claim for breach of fiduciary duty. The court further ruled that the factual question whether defendant had fraudulently concealed the access fee from plaintiff would be submitted to a jury in order to determine whether plaintiff could recover damages beyond the applicable period of limitations. Plaintiff voluntarily dismissed the three remaining claims. After a jury found that defendant had not fraudulently concealed the access fee from plaintiff, the court entered a judgment of $1,138,943 in plaintiff's favor. Defendant appealed.

The Court of Appeals *held*:

1. The trial court erred by granting plaintiff summary disposition of its breach-of-contract claim on the basis that the contract was missing an essential term. There are five elements of a valid contract: (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. The parties to a contract must have a meeting of the minds on all essential terms of a contract as judged by an objective standard based on the parties' express words and

visible acts. The failure to specify in the contract the actual dollar amount of the access fee did not render that contract term indefinite. Judicial avoidance of contractual obligations because of indefiniteness is not favored. When the promises and performances of each party are set forth with reasonable certainty, the contract will not fail for indefiniteness even if some terms are incomplete or indefinite as long as the parties intended to be bound by the agreement, particularly if one of the parties has rendered partial or full performance. If the price is indefinite, the purchaser may be required to pay and the seller required to accept a reasonable price. The parties in this case agreed to all the terms of a main administrative services contract, which expressly provided for the collection of additional fees in accordance with defendant's standard operating procedures, as well as to the terms of an incorporated schedule that reflected the parties' agreement that the access fee would covered three specific costs or charges, including the subsidy at issue. Consequently, the parties agreed to the payment of the access fee, what it covered, and how it would be paid.

2. The contract's failure to specify a dollar amount for the access fee did not make the fee unenforceable. The parties had specifically agreed to what comprised the access fee and how it was to be paid, and the amount was reasonably ascertainable through defendant's standard operating procedures, which included an objective formula for calculating the fee. Had plaintiff wanted to determine this amount, it could have done so through the contractual annual audit.

3. Defendant was entitled to summary disposition of plaintiff's claim for breach of fiduciary duty because, even assuming that defendant owed plaintiff a fiduciary duty, the alleged breach resulted from defendant's charging a fee that it was contractually entitled to charge.

Reversed and remanded for entry of an order granting defendant's motion for summary disposition of plaintiff's claims for breach of contract and breach of fiduciary duty.

1. CONTRACTS — ELEMENTS.

The elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation; for a contract to be enforceable, the parties must have a meeting of the minds on all the essential terms when judged by an objective standard based on the parties' express words and visible acts.

2. CONTRACTS — INDEFINITENESS — FAILURE TO SPECIFY COST AMOUNT.

A contract will not fail for indefiniteness when the promises and performances of each party are set forth with reasonable certainty even if some terms are incomplete or indefinite as long as the parties intended to be bound by the agreement, particularly if one of the parties has rendered partial or full performance; if the price is indefinite, for example, the purchaser may be required to pay and the seller required to accept a reasonable price, and if the time of performance is indefinite, performance may be required to be rendered within a reasonable time; a contractual fee may be enforceable despite the contract's failure to specify its dollar amount if the promises and performances to be rendered by each party were set forth with reasonable certainty.

3. ACTIONS — BREACH OF FIDUCIARY DUTY — FIDUCIARY RELATIONSHIPS.

A fiduciary relationship is a relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship; fiduciary relationships usually arise (1) when one person places trust in the faithful integrity of another who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.

Giarmarco, Mullins & Horton, P.C. (by *William H. Horton* and *Elizabeth A. Favaro*), and *Richard C. Lindsey, Jr.*, Corporation Counsel, for plaintiff.

Bodman PLC (by *James J. Walsh* and *Rebecca D'Arcy O'Reilly*) and *Leo A. Nouhan* for defendant.

Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

MURRAY, J. Defendant Blue Cross and Blue Shield of Michigan appeals as of right a final judgment entered in favor of plaintiff, Calhoun County, in the amount of $1,138,943. Defendant's appeal challenges several pre-

liminary rulings made by the trial court when deciding the parties' cross-motions for summary disposition, as well as the trial court's denial of defendant's motion to amend its affirmative defenses. We reverse the trial court's order granting plaintiff summary disposition on its breach-of-contract and fiduciary-duty claims and remand for entry of an order granting defendant's motion for summary disposition of those claims.

I. FACTUAL BACKGROUND[1]

This case is one of a series involving defendant and various governmental entities. Calhoun County has for years contracted with defendant to administer its self-insured health care plan. Defendant is governed by various Michigan statutes and is legally obligated to subsidize insurance policies for any Medicare-eligible person who is not a member of a "group." Defendant internally refers to this subsidy as "other than group" (OTG). Defendant is also required to maintain a contingency fund and ensure that each "line of business" is independently funded. Defendant's self-insurance plan is one "line of business."

In the late 1980s, defendant separately billed its customers for the cost of the OTG subsidy. Many self-insured customers were dissatisfied with paying the OTG charge; as a result, some customers hired defendant's competitors, while others simply refused to pay the OTG charge. Defendant ultimately decided to merge mandatory business charges such as the OTG charge into the hospital claims for self-insured plans. Thus, the various business charges were no longer

[1] The material facts are taken from plaintiff's complaint and the parties' motions for summary disposition. To the extent we have utilized some *nonmaterial* facts brought forward at trial, it has only been to provide some context to the circumstances giving rise to this case.

"visible" on billing statements, but were instead built into the bill submitted to the customer (after a reduction had already occurred because of defendant's network discounts). According to defendant, these built-in charges were part of an access fee that was structured in part as the cost for access to defendant's hospital network discounts.

II. THE CONTRACT BETWEEN THE PARTIES

Since 1990, plaintiff has contracted with defendant to administer plaintiff's self-insured health care plan. Pursuant to the parties' agreement, plaintiff reimburses defendant on a weekly basis for the medical claims submitted by its employees. This weekly payment includes the costs of actual claims (which, as noted, are initially reduced by defendant's network savings) and some additional fees. The amount of the payment is determined by the parties' administrative services contract (ASC). The ASC is the central contract for the insurance arrangement, and it determines the rights and obligations of each party.

The ASC outlined plaintiff's financial responsibilities as follows:

> **A. General Obligations.**
>
> The Group[2] will immediately assume: all risks; all financial obligations, including but not limited to Amounts Billed, court costs, and attorney's fees; and all other liabilities BCBSM may assume or which might otherwise attach with respect to processing Coverage pursuant to this Contract. The Group will make full payment and satisfaction to BCBSM for all amounts resulting from such risks, financial obligations, and liabilities. Group responsibility will not, however, include amounts resulting directly from any negligent processing/payment of claims by BCBSM.

[2] "The Group" refers to plaintiff.

B. Specific Obligations.

The Group will, for each Contract Year, *pay BCBSM the total of the following amounts*:

1. *Amounts Billed* during the current Contract Year.

2. The hospital prepayment reflecting the amount BCBSM determines is necessary for its funding of the prospective hospital reimbursement.

3. The actual administrative charge.

4. The group conversion fee.

5. Any late payment charge.

6. Any statutory and/or contractual interest.

7. Stop Loss premiums, if applicable.

8. Cost containment program fee, if applicable.

9. Any other amounts which are the Group's responsibility pursuant to this Contract, including but not limited to risks, obligations or liabilities, deficit amounts relating to previous agreements, and deficit amounts relating to settlements.

The Provider Network Fee, contingency, *and any cost transfer subsidies or surcharges ordered by the State Insurance Commissioner as authorized pursuant to 1980 P.A. 350* [*MCL 550.1101* et seq.] *will be reflected in the hospital claims cost contained in Amounts Billed*. [Emphasis added.]

The ASC defined "Amounts Billed" as "the amount the Group owes in accordance with BCBSM's standard operating procedures for payment of Enrollees' claims" and "Provider Network Fee" as "the amount allocated to the Group for the expenses incurred by BCBSM in the establishment, management and maintenance of its participating hospital, physician and other health care provider networks." The ASC expressly incorporated additional documents, including schedules, and contained a severability clause.

Each year the parties agreed to a new fee for defendant's administrative services, which was typically detailed in a document titled "Schedule A." The Schedule As included an "administrative charge" and a fee for "excess loss coverage" or "stop-loss coverage." The 1994 Schedule A also contained the following provision:

> 8. Effective with your current renewal, your hospital claims cost will reflect certain charges for provider network access, contingency, *and other subsidies as appropriate*. [Emphasis added.]

The Schedule As from 1995 to 2006 contained a substantially similar provision, stating either, "Your hospital claims cost reflects certain charges for provider network access, contingency, and other subsidies as appropriate," or something quite similar, while the 2007 Schedule A contained a more detailed provision acknowledging the agreed-upon fees and charges:

> 11. *A portion of your hospital savings has been retained by BCBSM to cover the ASC Access Fee. The ASC Access Fee covers* (a) costs associated with the establishment, management and maintenance of BCBSM's participating hospital, physician and other health provider networks, (b) charges to help maintain BCBSM's surplus at an appropriate level in compliance with regulatory and Blue Cross and Blue Shield Association standards, and (c) *cost transfer subsidies or surcharges authorized pursuant to 1980 P.A. 350, such as the group conversion fee and the 'other than group' subsidy*. [Emphasis added.]

The access fee[3] varied based upon projected business costs. The access fee was a fixed percentage of each hospital claim, and during separate litigation defendant produced a document titled "Development of Access Fee

[3] Although the contract denotes this fee as the "ASC Access Fee," the parties mostly refer to it as the "access fee." We will do the same.

Factors" that purportedly reflected defendant's formula for calculating the access fee.

III. PROCEDURAL HISTORY

Plaintiff's complaint contained two counts alleging breach of contract as well as additional counts alleging breach of fiduciary duty, conversion, and constructive fraud. In general, each of plaintiff's allegations centered on the assertion that the parties had not agreed to a price for the access fee and, even if they had, defendant unilaterally charged excessive fees in violation of the parties' agreement. In particular, with respect to its first breach-of-contract claim, plaintiff alleged that there was no agreement between the parties on the access fee because the lack of a stated price made the term so vague that no contract regarding that fee existed:

> 19. The contractual relationship between the parties is governed by two documents — the Master Contract and the yearly Schedule A. Plaintiff agreed to pay Defendant an Administrative Fee and Stop Loss Coverage. Plaintiff did not agree to pay Defendant an ASC Access Fee or other fee other than an Administrative Fee and Stop Loss Coverage. To the extent that the Master Contract or Schedule A make reference to charges for "provider network access, contingency and other subsidies as appropriate," *that provision is so vague, uncertain or ambiguous that an enforceable contract does not exist regarding that fee*. The amount, price or method to determine the amount or the price is absent. [Emphasis added.]

Plaintiff's second breach-of-contract claim asserted that if there was a contract regarding the fees, defendant violated the covenant of good faith and fair dealing by unilaterally determining the fee, which was unreasonably high.

After initially denying both motions for summary disposition, the trial court held a second hearing just prior to trial to reconsider the competing motions for summary disposition.[4] The trial court set forth several legal conclusions in support of its decision to grant plaintiff's motion:

> And what I've come up with is this: that the Plaintiff's theory in this case is that there is--that the contract between the parties provides for an access fee but provides for an indefinite means of determining what that fee will be. And so in looking at the contract language, it seems to me that there isn't--as a matter of law there is no agreement on what the price term was for the access fee.
>
> And the Plaintiff's counsel has presented a line of cases that indicate in that instance that that part of the contract providing for an access fee is unenforceable, which leads one to the conclusion that the Defendant is not allowed to charge an access fee. They did charge it. And so the only factual issue remaining for the jury is to determine if there was the issue of fraudulent concealment and how far back the Plaintiff can go with their claim for reimbursement of the access fee that the Defendant has already collected.
>
> The Defendant's theory of the case is that there was definitely an agreement for an access fee. There is a means for determining it even if it refers to the Defendant's standard operating procedure or other what I would term indefinite terms, and even if there--but even if the price is indefinite in nature, that the Defendant has not been harmed because the Defendant should be able to show that there certainly was an agreement for an access fee, and they ought to be able to present evidence about what that fee would or should have been worth. Really it strikes me as a *quantum meruit* type of analysis.
>
> In any event, I told the attorneys I've decide--I'm

[4] Defendant's motion was filed in lieu of an answer and was filed pursuant to MCR 2.116(C)(8). Plaintiff's motion for partial summary disposition was brought pursuant to MCR 2.116(C)(10) and sought judgment only on its breach-of-contract claims.

> deciding this legal issue in favor of the Plaintiff. So that gets us down to only one real factual issue, determining--and that is determining when [plaintiff] knew or should have known of the existence of this claim. And then that will determine how far back they can go.

The trial court then ruled that defendant was plaintiff's fiduciary as a matter of law:

> Another part of this case is the allegation that the Plaintiff breached a fiduciary--or the Defendant breached a fiduciary duty it owed to the Plaintiff. The Defendant is asserting that's an issue of law. I agree with that. And I'm determining based on what's been presented already that's not contested that there was a fiduciary duty, and that's because the Defendant was receiving health care claims from health care providers for the Defendant's employee, acting as their agent and paying those claims, accounting for those things to the Plaintiff, and then billing the Plaintiff for those items.
>
> And [defendant's counsel] correctly pointed out that there has to be a scope to that duty, and, as I see it, the scope of the duty was simply to bill the Plaintiff accurately for claims that were presented. And so the part of this case that's troubling to me is that bills were presented to the Plaintiff that said we paid X number of dollars of health care claims for your employees over the past year, with no disclosure that some percentage of those payments were actually this access fee that was never disclosed--at least prior to 2006 was never clearly disclosed by the Defendant to the Plaintiff.
>
> So I'm ruling as a matter of law on that issue. So I believe the only remaining issue is the issue of fraudulent concealment.

The trial court ultimately entered an order granting partial summary disposition to plaintiff on the breach-of-contract and breach-of-fiduciary-duty claims, and plaintiff later voluntarily dismissed the remaining three claims. Defendant moved to add a counterclaim

for quantum meruit and return of its consideration, which the trial court denied.[5]

IV. ANALYSIS

Defendant argues that the trial court erred in denying its motion for summary disposition of plaintiff's breach-of-contract claims. Defendant's argument is two-fold. First, defendant argues that the access fee was specific enough that the contract did not fail for indefiniteness. Second, defendant argues that even if the contract was ineffective, the remedy would not be liability for breach of a contract, but would instead be a ruling that the failure of consideration caused there to be no contract between the parties.

This Court reviews de novo the grant or denial of a motion for summary disposition filed under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When a motion is brought under that subrule, the trial court must consider the "affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties," MCR 2.116(G)(5), "in the light most favorable to the party opposing the motion," *Maiden*, 461 Mich at 120. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open

[5] A three-day jury trial was conducted to determine whether defendant had fraudulently concealed the access fee from plaintiff. If the jury had found in plaintiff's favor, plaintiff would have been able to recover damages for the breach of contract beyond the applicable statute of limitations. However, after one hour of deliberations, the jury found that defendant had not fraudulently concealed the access fee from plaintiff.

an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In addressing the validity of the trial court's decision, both parties cite evidence produced at the trial held on the fraudulent-concealment issue. Much of that evidence, and of course all the trial testimony, was not available to the trial court when it decided the motions for summary disposition prior to trial. Consequently, we cannot look to that evidence in determining whether the trial court properly granted the motion. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003); *Zurcher v Herveat*, 238 Mich App 267, 292; 605 NW2d 329 (1999). Instead, we are limited to considering the evidence submitted to the trial court before its decision on the motions. *Zurcher*, 238 Mich App at 292.

A. WAS THERE A CONTRACT?

With respect to plaintiff's first breach-of-contract claim, defendant's primary argument is that the trial court erred in granting partial summary disposition to plaintiff on the basis that the contract was missing an essential term. Construction and interpretation of a contract are questions of law that we review de novo, meaning that we do so without deference to the trial court's decision. *Comerica Bank v Cohen*, 291 Mich App 40, 46; 805 NW2d 544 (2010). In *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997), this Court explained:

> Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposi-

> tion is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning. [Citations omitted.]

There are five elements of a valid contract: "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005) (quotation marks and citation omitted). Most of the elements listed above reflect the fact that the parties to a contract must have "a meeting of the minds on all essential terms of a contract." *Burkhardt v Bailey*, 260 Mich App 636, 655; 680 NW2d 453 (2004). "Where mutual assent does not exist, a contract does not exist." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003).[6] " 'A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.' " *Stanton v Dachille*, 186 Mich App 247, 256; 463 NW2d 479 (1990), quoting *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812, 818; 428 NW2d 784 (1988).

There is no dispute that elements one and two have been satisfied, i.e., that the parties were competent to contract and that the contract involved a proper subject matter. The parties also do not seem to dispute that there was legal consideration supporting the contract. The essence of consideration—whatever form it takes—is that there be a bargained-for exchange be-

[6] " 'Meeting of the minds' is a figure of speech for mutual assent." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992).

tween the parties. *Higgins v Monroe Evening News*, 404 Mich 1, 20; 272 NW2d 537 (1978). Typically, consideration will, at least for one side of the contract, take the form of the payment of legal tender. See *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 244; 625 NW2d 101 (2001). Here, there is no question that legal consideration supported the contract. Defendant agreed to administer plaintiff's self-insured health care plan, and in return plaintiff agreed to compensate defendant with the payment of legal tender. And finally, there is no dispute that the parties mutually agreed to be bound to these respective rights and obligations. Consequently, and as plaintiff repeatedly states in its brief on appeal,[7] a contract existed between the parties.

Despite the concession that a valid contract existed between the parties, plaintiff's breach-of-contract claim asserts that the failure to specify in the contract the actual dollar amount of the access fee rendered that "contract term" indefinite. In addressing this issue, we are ever mindful that judicial avoidance of contractual obligations because of indefiniteness is not favored under Michigan law, and so when the promises and performances of each party are set forth with reasonable certainty, the contract will not fail for indefiniteness. *Nichols v Seaks*, 296 Mich 154, 159; 295 NW 596 (1941).

In accordance with this principle, the absence of certain terms—including at times the price—does not necessarily render a contract invalid. Some 40 years ago, in *J W Knapp Co v Sinas*, 19 Mich App 427,

[7] Plaintiff states its position this way in its brief on appeal: "The parties agree that there is a contract. Indeed, this contract was performed: claims were processed and paid, advances were made, quarterly and annual settlements occurred – all pursuant to the contract. The dispute is simply over one of its terms – the ASC Access Fee."

430-431; 172 NW2d 867 (1969), we outlined the general common-law rule that a contract may be enforced despite some terms being incomplete or indefinite so long as the parties intended to be bound by the agreement:

> Even though important terms of the contract were indefinite the trial judge acted properly in supplying the necessary additions. *In an appropriate case an agreement may be enforced as a contract even though incomplete or indefinite in the expression of some term, if it is established that the parties intended to be bound by the agreement, particularly where one or another of the parties has rendered part or full performance. Where the price is indefinite, the purchaser may be required to pay and the seller to accept a reasonable price.* Where the time of performance is indefinite, performance may be required to be rendered within a reasonable time. Each case will turn on its own facts and circumstances. See 1 Corbin on Contracts, § § 95, 96, 99, 102; 5 Williston on Contracts, § 1459; 1 Williston on Contracts (3d ed), § § 36, 36A, 40, 41, 49; Restatement, Contracts, § 5. [Emphasis added.]

In reviewing the contract terms agreed to by the parties, we reach several legal conclusions. First, the parties agreed to all the terms of the ASC and Schedule A, so there is no question that they " 'intended to enter into a binding contract[.]' " *Nichols*, 296 Mich at 159, quoting 1 Williston on Contracts (rev ed), § 37, p 100. This conclusion applies with equal force to the more discrete question of agreement to the access fee. Contrary to plaintiff's argument, the language of the ASC expressly provided for the collection of additional fees beyond the administrative charge and stop-loss coverage. Plaintiff's contractual obligations are listed under article III of the ASC, the final provision of which states: "The Provider Network Fee, contingency, and any cost transfer subsidies or surcharges ordered by the State Insurance Commissioner as authorized pursuant

to 1980 P.A. 350 will be reflected in the hospital claims cost contained in Amounts Billed."[8]

According to this unnumbered provision, the parties agreed that plaintiff would be charged for additional fees beyond the administrative charge and stop-loss coverage, and that those fees would be reflected in the hospital claims cost contained in "Amounts Billed." The term "Amounts Billed" was broadly defined in the ASC as the amount owed in accordance with defendant's "standard operating procedures." Thus, the agreed-upon terms of the ASC allowed for the collection of the access fee, the means for collection, and the process through which it could be determined.

This is also reflected in Schedule A, which has since at least January 2007 reflected the parties' agreement that the access fee covered three specific costs or charges and would be retained by defendant as a part of the overall savings realized by plaintiff:

> 11. A portion of your hospital savings has been retained by BCBSM to cover the ASC Access Fee. The ASC Access Fee covers (a) costs associated with the establishment, management and maintenance of BCBSM's participating hospital, physician and other health provider networks, (b) charges to help maintain BCBSM's surplus at an appropriate level in compliance with regulatory and Blue Cross and Blue Shield Association standards, and (c) cost transfer

[8] In a December 21, 1992, ruling, Michigan Insurance Commissioner David J. Dykhouse stated that, with respect to the OTG costs, "it is BCBSM's obligation to pursue the collection of cost transfers from its ASC customers." Final Decision (Case No. 91-11806-BC), p 5. The rationale was that because defendant's ASC customers derive a benefit from defendant's tax-exempt status, it is not unreasonable to expect that the ASC customers would also contribute (just as defendant's other lines of business do) a cost transfer to foster the affordability of health care coverage for Michigan's elderly residents. See *Pipefitters Local 636 Ins Fund v Blue Cross Blue Shield of Mich*, 654 F3d 618, 632 (CA 6, 2011).

> subsidies or surcharges authorized pursuant to 1980 P.A. 350, such as the group conversion fee and the 'other than group' subsidy.

Consequently, the parties unequivocally agreed to the payment of the access fee, what it covered, and how it would be paid. This takes us to the ultimate question raised by plaintiff: Does the contract's failure to reference a specific dollar amount for, or allegedly a means for calculating, the access fee make the fee unenforceable? For the reasons expressed below, we answer that question in the negative.

In determining the answer to this question, we first look to the language of the parties' agreement. *Meagher*, 222 Mich App at 721-722. In doing so, we also remain cognizant of what we recognized earlier, which is that our courts do not look favorably on arguments that a contract cannot be enforced because of the indefiniteness of a term. *Nichols*, 296 Mich at 159; see, also, *Waites v Miller*, 244 Mich 267, 272; 221 NW 171 (1928). This sound rule is premised in part on the principle that parties to contracts should not be readily able to evade their obligations using after-the-fact assertions of indefiniteness. See *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 556; 473 NW2d 652 (1991) (BOYLE, J., concurring). As we consider this issue, we are also keenly aware that the challenged access fee is not the only consideration involved in this contract, but is instead one of several forms of costs and charges agreed to by the parties.[9]

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[9] It is primarily for this reason that the cases relied on by plaintiff are of no real assistance. In *Dayton v Stone*, 111 Mich 196, 199; 69 NW 515 (1896), for example, the parties entered into a contract for the sale of both damaged and undamaged goods, but had failed to agree on the value or valuation mechanism for the damaged goods, which, given the subject of the contract, was an essential term. Likewise, the parties in *Reed v Vander Zalm*, 336 Mich 1, 9; 57 NW2d 304 (1953), had allegedly

Turning to the contract itself, there is no doubt that the parties entered into a valid and enforceable contract that has been performed by both parties over a significant number of years, a fact plaintiff readily admits. And as part of that contract, the parties agreed that the access fee would be paid out of the savings plaintiff benefited from as a result of defendant's network savings. Although the contract does not have a specific price for the access fee, it is nonetheless binding on the parties because "the promises and performances to be rendered by each party are set forth with reasonable certainty." *Nichols*, 296 Mich at 159. In other words, because there is no dispute that the parties specifically agreed to the access fee, what comprised the access fee, and how it was to be paid, and because the amount was reasonably ascertainable through defendant's standard operating procedures, the contract does not fail for indefiniteness.

It is simply not enough to say that the fee agreed to is not binding because no specific dollar figure was placed in the contract.[10] As reflected above, the answer instead comes from looking at the *entire* agreement and

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contracted for the purchase of land and the erection of a building, but the Court held that there had been no meeting of the minds on the cost of the house, the lot, or the insurance and taxes and that there was no provision in the alleged agreement that could be looked to in defining these costs. Finally, in *Zurcher*, 238 Mich App at 294-295, the Court held that the consideration (the price of the house) *was* stated and so was not at issue in the case, while in *Ford Motor Co v Kahne*, 379 F Supp 2d 857, 874-875 (ED Mich, 2005), the court was addressing an alleged contract that had purposely left material terms open to future negotiation, which is not what is presented here.

[10] Though there is no need to rely on decisions from outside our state to decide this issue, we note that this point has been recognized before today. See, e.g., *GEM Advisors, Inc v Corporación Sidenor, SA*, 667 F Supp 2d 308, 326 (SD NY, 2009) ("The failure to fix a sum certain, however, is not necessarily fatal to a contract."), relying on *Cobble Hill Nursing Home v Henry & Warren Corp*, 74 NY2d 475, 483; 548 NYS2d 920; 548 NE2d 203 (1989).

determining its *full* substance in order to enforce the parties' intentions. *Higbie v Chase*, 306 Mich 577, 595-596; 11 NW2d 248 (1943). Plaintiff does not dispute that defendant was able to calculate the access fee amounts through the "Development of Access Fee Factors," which is in conformity with defendant's "standard operating procedures."[11] As defendant argues, the "Development of Access Fee Factors" reflects an objective formula, based on a review of the fees and costs historically charged to plaintiff, for calculating the amount actually comprising the access fee. This manner of determining the contractually agreed amount of the access fee is entirely consistent with the plain language of the contract, as well as Michigan common law. *Waites*, 244 Mich at 272 ("Courts do not favor the destruction of contracts because of indefiniteness, and hold that uncertainty may be removed by subsequent acts, conduct, declarations, or agreements of the parties."); see, also, *Shelton v Wilson*, 274 Mich 433, 436; 264 NW 854 (1936); *Thompson v Tucker-Osborn*, 111 Mich 470, 479-480; 69 NW 730 (1897); 1 Restatement Contracts, 2d, § 34(2), p 97. There is also no dispute that had plaintiff wanted to determine this amount, it had the ability to do so through the contractual annual audit, in which presumably the same "Development of Access Fee Factors" and the results of its formula would have been produced. For these reasons, we hold that the access fee was readily ascertainable through defendant's standard operating procedures, and therefore plaintiff was obligated to pay the fee to which it agreed.[12]

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[11] Plaintiff's counsel admitted to the trial court at the October 23, 2008, motion hearing that defendant does "have a methodology," but argued that plaintiff did not agree to it.

[12] As a result of this conclusion, we need not address defendant's alternative argument that if there was no readily ascertainable and

B. FIDUCIARY DUTY

The trial court also held as a matter of law that defendant had a fiduciary duty toward plaintiff and that defendant breached that duty. Whether to recognize a cause of action for breach of fiduciary duty is a question of law reviewed de novo, *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 574; 603 NW2d 816 (1999), because the existence of a duty is generally a question of law, *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 43; 698 NW2d 900 (2005).

A fiduciary relationship is

> "[a] relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client—require the highest duty of care. Fiduciary relationships [usually] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer." [*In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003), quoting Black's Law Dictionary (7th ed).]

Even assuming that defendant owed a fiduciary duty to plaintiff, as a result of our holding that defendant was authorized by the contract to charge the access fee, plaintiff cannot maintain its breach-of-fiduciary-duty

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agreed-upon fee amount, the result would not be a cause of action for breach of contract, but would instead be that no contract between the parties existed, at least as far as the access fee was concerned.

claim. Plaintiff's complaint specifically alleges that defendant had a duty to "clearly disclose to Plaintiff that it was charging Plaintiff additional fees, the amount of those fees and not to undertake a program of misinformation . . . regarding those fees." Plaintiff then alleged that defendant violated that duty "by . . . charging and . . . receiving a secret fee from plaintiff's account."[13] However, because this alleged breach of duty resulted from defendant's charging a fee that it was contractually entitled to charge, that allegation should also have been dismissed on defendant's motion for summary disposition.

We reverse the trial court's order granting plaintiff summary disposition of its claims for breach of contract and fiduciary duty and remand for entry of an order granting defendant's motion for summary disposition of those claims.

No costs, neither side having prevailed in full on the merits of the case. MCR 7.219(A).

FITZGERALD, P.J., and GLEICHER, J., concurred with MURRAY, J.

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[13] Plaintiff also alleged that defendant fraudulently concealed the fees, but as noted the jury rejected that position.

PEOPLE v GRAY

Docket No. 302168. Submitted May 8, 2012, at Marquette. Decided June 5, 2012, at 9:05 a.m.

Orlando Ray Gray pleaded guilty in the Gogebic Circuit Court to one count each of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), operating a motor vehicle while having a controlled substance in his body (marijuana), MCL 257.625(8), and interfering with or influencing a witness by threat or intimidation, MCL 750.122(3). At sentencing, the court, Roy D. Gotham, J., assessed 50 points for offense variable (OV) 15 (aggravated controlled substance offenses), MCL 777.45, after including the amount of cocaine used to support the charges that were dismissed pursuant to defendant's plea of guilty to the sentencing offense of possession with intent to deliver cocaine. Those points resulted in a higher recommended minimum sentence range under the sentencing guidelines and the imposition of a minimum sentence within that higher range. Defendant filed a delayed application for leave to appeal the trial court's denial of his motion to vacate the conviction of possession with intent to deliver, which the Court of Appeals denied in an unpublished order, entered June 1, 2009 (Docket No. 291210). In lieu of granting leave to appeal, the Supreme Court vacated the circuit court's sentence and remanded for resentencing and for reconsideration of the scoring of OV 15 in light of the Court's opinion in *People v McGraw*, 484 Mich 120 (2009). 485 Mich 934 (2009). On remand, the circuit court assessed 50 points again for OV 15 and sentenced defendant to the same term of years imposed in the original sentence. The Court of Appeals granted defendant's delayed application for leave to appeal.

The Court of Appeals *held*:

1. The interpretation and application of the legislative sentencing guidelines, MCL 777.1 *et seq*., is a legal question that is reviewed de novo. If a minimum sentence is within the appropriate guidelines sentence range, the Court of Appeals must affirm a sentence and not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the sentence. It is within the sentencing court's

discretion to determine the number of points to be scored for each offense variable, provided that the record evidence adequately supports a particular score. Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable. OV 15 does not provide otherwise and, therefore, only conduct related to and forming the basis of the sentencing offense may be examined to assess points under this variable; conduct that forms the basis of charges that have been dismissed may not be reviewed or considered when assessing points under OV 15 for the sentencing offense, regardless of the sequence in which the conduct transpired. The circuit court erred by assessing 50 points for OV 15, MCL 777.45(1)(c), on the basis of unrelated charges that had been dismissed pursuant to a plea bargain. The sentencing offense involved conduct relating to defendant's possession with intent to deliver less than 50 grams of cocaine in a motor vehicle stopped by the police, which was not an amount sufficient to allow 50 points to be assessed for OV 15.

2. Because the score for OV 15 should have been zero points, MCL 777.45(1)(h), the minimum sentence range was reduced and resentencing was required.

Reversed and remanded for resentencing.

SENTENCING — SENTENCING GUIDELINES — SCORING OF OFFENSE VARIABLES — OFFENSE VARIABLE 15.

Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable; offense variable 15 (aggravated controlled substance offenses) does not provide otherwise and, therefore, only conduct related to and forming the basis of the sentencing offense may be examined when assessing points under this variable; conduct that forms the basis of charges that have been dismissed may not be reviewed or considered when assessing points under offense variable 15, regardless of the sequence in which the conduct transpired (MCL 777.45).

State Appellate Defender (by *Anne M. Yantus*) for defendant.

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM. Defendant pleaded guilty to one count each of possession with intent to deliver less than 50

grams of cocaine, MCL 333.7401(2)(a)(*iv*), operating a motor vehicle while having a controlled substance in his body (marijuana), MCL 257.625(8), and interfering with or influencing a witness by threat or intimidation, MCL 750.122(3). He was sentenced to concurrent terms of 5 to 20 years' imprisonment for the possession of cocaine conviction, 93 days' imprisonment for the motor-vehicle-related conviction, and 32 months to 4 years' imprisonment for the witness-tampering conviction. Defendant appeals by delayed application for leave to appeal granted, challenging the assessment of 50 points with respect to offense variable (OV) 15, MCL 777.45, which addresses aggravated controlled substance offenses. We hold that OV 15 should have been assigned a score of zero points and that it was improper for the trial court to take into consideration in scoring OV 15 amounts of cocaine related to dismissed counts but wholly unrelated to the cocaine possession "sentencing offense" to which defendant pleaded guilty. Accordingly, we reverse and remand for resentencing.

The police discovered significantly less than 50 grams of cocaine in a vehicle defendant was operating after the vehicle was pulled over for failing to stop at a stop sign.[1] The police had prior knowledge that the vehicle, which had two occupants in addition to defendant, might be used to transport narcotics. Defendant did not have a valid driver's license, and there was an outstanding felony warrant for his arrest. Defendant informed the police that he was on his way to a local motel where his girlfriend was awaiting his arrival. Police officers proceeded to the motel and contacted defendant's girlfriend. She invited the officers into her motel room after which she was arrested on a preexisting felony warrant. The police noticed the odor of

[1] It appears that 0.6 of a gram of cocaine was found in the car.

marijuana in the motel room, and defendant's girlfriend had drug paraphernalia on her person. On execution of a search warrant, officers discovered 64 grams of cocaine in the motel room. In a taped phone call from defendant to his girlfriend while housed in the county jail, defendant demanded that she inform the police that he had never set foot in the motel room. Defendant acknowledges that there was evidence that he had a key to the motel room and that, although he later changed his story, he had initially told the police that he was staying in the room.

Defendant pleaded guilty to the three offenses noted above in exchange for the prosecution's withdrawal of an habitual offender notice, a recommendation for a minimum sentence within the guidelines range, and the dismissal of certain charges, which included possession with intent to deliver 50 grams or more, but less than 450 grams, of cocaine, MCL 333.7401(2)(a)(*iii*), simple possession of 50 grams or more, but less than 450 grams, of cocaine, MCL 333.7403(2)(a)(*iii*), simple possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*), and driving without a license, MCL 257.301(1). At the plea proceeding defendant admitted, with respect to the day of his arrest, that he had smoked some marijuana, that he then proceeded to drive a motor vehicle with his destination being the motel where his girlfriend was staying, that he was pulled over by the police before arriving at the motel, and that in a search of the car the police found some cocaine, which defendant had intended to sell. There is no dispute that the cocaine possession charge to which defendant pleaded guilty was predicated on the cocaine in the car, not the cocaine in the motel room, and that the cocaine in the motel room formed the basis for other charges that were dropped as part of the plea deal.

Following entry of the plea agreement, sentencing information was gathered and prepared. The controlled substance (cocaine) offense to which defendant pleaded guilty is a class D offense, MCL 777.13m, and defendant's total OV score was 60 points, placing him at OV level V on the sentencing grid, MCL 777.65. Defendant's total prior record variable (PRV) score was 65 points, placing him in PRV level E on the sentencing grid. MCL 777.65. The minimum sentence range was thus set at 34 to 67 months in prison. *Id.* With respect to the offense variables, 50 of the 60 total points assigned were attributable to OV 15. Absent those 50 points, the minimum sentence range would have been 10 to 23 months in prison. *Id.*[2] In regard to OV 15, MCL 777.45 provides, in pertinent part:

> (1) Offense variable 15 is aggravated controlled substance offenses. Score offense variable 15 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (c) The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 50 or more grams but less than 450 grams of any mixture containing a controlled substance..... 50 points.

Defendant filed a motion to vacate the sentence for the cocaine possession conviction, arguing that OV 15 should not have been assessed 50 points because the

[2] Such an alteration in the minimum sentence range would compel resentencing. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006). We note that at the subsequent resentencing of defendant the total OV score was 65 points, because 5 points were assigned for OV 12, MCL 777.42 (contemporaneous felonious criminal acts), which had not been assigned at the initial sentencing.

sentencing offense involved less than 50 grams of cocaine and charges regarding the greater amount found in the motel room were dismissed under the plea agreement. In a written opinion and order, the trial court reviewed the evidence, focusing on the "64 grams of cocaine found in room 31 of Davey's Motel during a search of that room . . . ." The trial court ruled that the evidence "supported the initial charge against defendant of possession of more than 50 grams of cocaine found in room 31, and provides record support for scoring . . . Offense Variable 15 at 50 points." Defendant's delayed application for leave to appeal the ruling was denied by this Court. *People v Gray*, unpublished order of the Court of Appeals, entered June 1, 2009 (Docket No. 291210). On application for leave to appeal to our Supreme Court, the Court ruled in an order as follows:

> Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Gogebic Circuit Court and we remand this case to the trial court for resentencing. On remand the trial court shall reconsider the scoring of offense variable 15 in light of this Court's opinion in *People v McGraw*, 484 Mich 120[771 NW2d 655] (2009). The trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range . . . . In all other respects, the application for leave to appeal is denied because we are not persuaded that the question presented should be reviewed by this Court. [*People v Gray*, 485 Mich 934 (2009).]

On remand for resentencing, the trial court once again imposed a score of 50 points for OV 15. In retaining the score of 50 points, the court distinguished *McGraw* on the basis that *McGraw* rejected for scoring consideration events that transpired after the sentenc-

ing offense was completed whereas here the possession of the cocaine in the vehicle and the possession of the cocaine in the motel room occurred at the same time. At the subsequent hearing on defendant's motion to correct an invalid sentence, the trial court again affirmed the score for OV 15, noting:

> [A]nd of course it is true that he possessed [the cocaine] in two different locations approximately five blocks from each other, but given the whole scheme of things it is obvious that he could pull smaller amounts from that which he had brought here for the purpose of selling here, and it's not simply a matter of constructive possession. It is simply clear that he possessed all of it at that time.

Defendant's delayed application for leave to appeal the ruling was granted by this Court. *People v Gray*, unpublished order of the Court of Appeals, entered March 3, 2011 (Docket No. 302168).

On appeal, defendant argues that, in light of *McGraw*, OV 15 must be scored for possessing the amount of cocaine found solely in the vehicle, i.e., the sentencing offense, and cannot be scored on the basis of other drug offenses committed during a similar period but dismissed as part of the plea agreement. We agree.

"If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006), citing *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "A trial court determines the sen-

tencing variables by reference to the record, using the standard of preponderance of the evidence," and "[w]e review for clear error a court's finding of facts at sentencing." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), citing *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006), and *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). "The interpretation and application of the legislative sentencing guidelines, MCL 777.1 *et seq*.[,] involve legal questions that this Court reviews de novo." *McGraw*, 484 Mich at 123.

We begin with a review of the *McGraw* opinion. In *McGraw*, the defendant broke into stores on three separate occasions. After the defendant and his accomplices left the scene of the final break-in, the police spotted their getaway car and pursued it. The vehicle chase concluded when the defendant's car crashed into a fence, and the defendant was subsequently captured after a short foot pursuit. The defendant pleaded guilty to three counts of breaking and entering in exchange for the dismissal of other charges, including the charge of fleeing and eluding the police. At sentencing, the court assessed 10 points under OV 9, MCL 777.39, finding that the defendant had placed at least two people in danger of physical injury or death.[3] The score for OV 9 resulted from the defendant's act of fleeing the police and not the break-ins. *McGraw*, 484 Mich at 122-123.

The *McGraw* Court initially noted and reaffirmed its holding in *People v Sargent*, 481 Mich 346; 750 NW2d 161 (2008), stating:

> We addressed what conduct the sentencing court should consider in . . . *Sargent*. We explained that "the offense

[3] MCL 777.39(1)(c) calls for the assessment of 10 points when "[t]here were 2 to 9 victims who were placed in danger of physical injury or death[.]"

> variables are generally offense-specific. The sentencing offense determines which offense variables are to be scored in the first place, and then the appropriate offense variables are generally to be scored on the basis of the sentencing offense." We stated that usually "only conduct 'relating to the offense' may be taken into consideration when scoring the offense variables." [*McGraw*, 484 Mich at 124, quoting *Sargent*, 481 Mich at 348-349.]

The Court concluded that offense variables, except as specifically provided otherwise, must be scored by reference solely to the sentencing offense. *McGra*w, 484 Mich at 129. The *McGraw* Court noted that a prosecutor is always free to charge a defendant with multiple offenses, assuming their existence, rather than one offense, in which case the defendant "would be sentenced for all offenses for which a conviction was obtained." *Id.* at 130. The Court ultimately held:

> We conclude that the Court of Appeals erred by considering the entire criminal transaction and using defendant's conduct after the crime was completed as the basis for scoring OV 9. Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable. OV 9 does not provide for consideration of conduct after completion of the sentencing offense. Therefore, it must be scored in this case solely on the basis of defendant's conduct during the breaking and entering. If the prosecution had wanted defendant to be punished for fleeing and eluding, it should not have dismissed the fleeing and eluding charge. It would be fundamentally unfair to allow the prosecution to drop the fleeing and eluding charge while brokering a plea bargain, then resurrect it at sentencing in another form.
>
> When we consider only the breaking and entering, it is apparent that no one was placed in danger of injury or loss of life. No one was present in the general store or anywhere near the defendant when he broke into the building. Even under the current version of OV 9, which allows consideration of property loss, the owner of the general store would

> be the only victim. Defendant's flight from the police occurred after the offense was completed for purposes of scoring the sentencing guidelines; hence, it cannot be considered in scoring OV 9. Defendant did not place two to nine victims in danger of injury or loss of life. Therefore, no points should have been assessed for OV 9. [*Id.* at 133-135.]

With respect to the case at bar, we first note that OV 15 expressly references the "offense," which would be the "sentencing offense" under the *McGraw* analysis given that OV 15 does not specifically provide otherwise, before alluding to the amount of controlled substances involved with said offense. MCL 777.45(1)(c). For purposes of our analysis, we shall assume that there was sufficient record support for the conclusion that defendant possessed, constructively or otherwise, the cocaine in the motel room and did so at the same time that he possessed the cocaine in the car.[4] In other words, we shall presume simultaneous possession so that it cannot be concluded that "one" crime had been completed before the other crime commenced.

In this case, the sentencing offense solely involved the cocaine in the vehicle driven by defendant; therefore, "[t]he offense involved the . . . possession with intent to . . . deliver" *less* than 50 grams of cocaine,

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[4] In *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), when discussing the various principles applicable to the possession of narcotics, our Supreme Court stated:

> A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance.
>
> [T]he evidence produced at trial showed that [the defendant] constructively possessed the cocaine, i.e., that he "had the right to exercise control of the cocaine and knew that it was present." [Citations omitted.]

MCL 333.7401(2)(a)(*iv*), which is not an amount that allows 50 points to be assessed for OV 15, MCL 777.45(1)(c). The sentencing offense did not involve the cocaine found in the motel room; therefore, contrary to the trial court's ruling, the offense did not involve the "possession with intent to . . . deliver . . . 50 or more grams but less than 450 grams" of cocaine. *Id*. Indeed, a review of MCL 777.45(1) reveals, in conjunction with a consideration of the record, that none of subdivisions (a) through (g) (points ranging from 5 to 100) applies, triggering the application of subdivision (h), which requires a score of "0 points" when "[t]he offense was not an offense described in subdivisions (a) through (g)."

As stated in *McGraw*, 484 Mich at 124, we only examine the "conduct" related to the sentencing offense unless otherwise indicated; MCL 777.45 does not indicate otherwise. The "conduct" relating to defendant's sentence for possession of cocaine with intent to deliver concerned defendant's possession of less than 50 grams of cocaine in the motor vehicle stopped by the police. The conduct relating to possession of the cocaine in the motel room was the subject of counts that were dismissed pursuant to the plea agreement. As indicated above, the *McGraw* Court expressed that "[i]t would be fundamentally unfair to allow the prosecution to drop . . . [a] charge while brokering a plea bargain, then resurrect it at sentencing in another form." *McGraw*, 484 Mich at 134. If the prosecution wished defendant to be punished for possessing the cocaine in the motel room, it should not have dismissed the charges linked to that cocaine. This is not to say that the cocaine in the motel room was entirely off-limits for purposes of sentencing. In *McGraw*, the Court noted "that conduct beyond the sentencing offense can be considered for purposes of departing from the guidelines." *Id.* at 130 n

30. Nothing in this opinion should be construed as precluding the trial court from contemplating a departure on resentencing.

Our Supreme Court in *McGraw* ruled that unless a scoring variable provides otherwise, a defendant's conduct occurring after an offense is completed does not relate back to the sentencing offense for purposes of scoring a variable; rather, the variable must be scored on the basis of conduct occurring during the sentencing offense. *Id.* at 122. At first glance, this holding might suggest that defendant's presumed conduct in possessing the cocaine in the motel room could be considered under OV 15, given that it constituted conduct occurring during the sentencing offense, i.e., possession of the cocaine found in the car. But such a conclusion is unsound once *McGraw* is considered in context.

The sentencing offense in *McGraw* was breaking and entering, and the dismissed offense was fleeing and eluding the police. The conduct underlying the breaking and entering offense took place first followed by the conduct forming the basis of the dropped fleeing and eluding charge. And in examining the number of victims for purposes of scoring OV 9, it was only permissible to consider the conduct associated with the sentencing offense and not the dismissed offense. The offenses and related underlying conduct had to be reviewed or considered separately under *McGraw* relative to scoring the variables. Here, the sentencing offense (possession of cocaine found in the car) and the dismissed offense (possession of cocaine found in the motel room) did not happen in sequence, one after the other, but rather occurred simultaneously. However, *McGraw* still requires a court to separate the conduct forming the basis of the sentencing offense from the conduct forming the basis of an offense that was

charged and later dismissed or dropped, regardless of the sequence in which the conduct transpired. The conduct associated with possessing the cocaine in the motel room formed the basis of some of the dismissed charges, and the conduct associated with possessing the cocaine in the motor vehicle formed the basis of the cocaine possession sentencing offense. Under *McGraw*, the conduct must be considered separately in relationship to scoring OV 15, and the conduct related to the cocaine possessed in the motel room, which conduct was forgiven as part of the plea agreement, could not be considered in scoring OV 15. Therefore, the trial court erred by assessing 50 points for OV 15 under MCL 777.45(1)(c), when the conduct related to the sentencing offense alone did not involve at least 50 grams of cocaine. Finally, as indicated earlier, absent application of MCL 777.45(1)(c), the appropriate score for OV 15 is zero points. The reduction in the score results in an alteration of the minimum sentence range and thus requires resentencing. *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

We reverse and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

MARKEY, P.J., and BECKERING and M. J. KELLY, JJ., concurred.

In re OLIVE/METTS MINORS

Docket No. 306279. Submitted May 4, 2012, at Detroit. Decided June 5, 2012, at 9:10 a.m. Leave to appeal denied, 492 Mich 859.

The Department of Human Services (DHS) first petitioned the Wayne Circuit Court in 2007 for temporary custody of W. Metts's children at the time, AM1 and RO, in light of evidence of improper supervision and environmental neglect. The children were placed in foster care, and Metts was ordered to participate in services, including anger-management and parenting classes. Metts had an additional child, AM2, in 2009. The court subsequently terminated its jurisdiction in October 2009. Metts had two additional children, twins, DM1 and DM2, in 2010. The DHS filed a second petition for temporary custody in March 2011 following allegations of physical abuse by Metts and her mother. Metts pleaded no contest to the allegations, admitting that there had been physical child abuse on several occasions. The court, Jerome C. Cavanagh, J., ordered termination of Metts's parental rights to all five children, concluding that several statutory grounds for termination had been proved by clear and convincing evidence and that termination of her rights was in the children's best interests. Metts appealed.

The Court of Appeals *held*:

1. A court may terminate a respondent's parental rights if one or more of the statutory grounds for termination are established by clear and convincing evidence. The trial court did not clearly err by finding that grounds under MCL 712A.19b(3)(j) (reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent) were established by clear and convincing legally admissible evidence. Metts had struggled with anger management for years and was still unable to control her anger despite her participation in anger-management classes, as demonstrated by her arrest for disturbing the peace in August 2011 following an altercation with a teacher and the police. The evidence showed that the older children were mimicking Metts's behavior. Therefore, the court properly found that the children were reasonably likely to be harmed if returned to Metts's home.

2. Once a statutory ground for termination has been proved, the trial court must find that termination is in the child's best interests before it can terminate parental rights. In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. The trial court has a duty to decide the best interests of each child individually. Although in most cases it will be in the best interests of each child to keep brothers and sisters together, if keeping the children together is contrary to the best interests of an individual child, the best interests of that child will control. A trial court's failure to explicitly address whether termination is appropriate in light of the child's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal. In this case, the evidence showed that Metts loved her children and that the three older children loved her, but the evidence also showed that she struggled to cope with five children, was unable to control her temper to the detriment of the children, lacked a source of income, had lost her home, and was in jail. Metts had failed to derive any lasting benefit from services previously provided, and there were no additional services that could be provided. The evidence supported the trial court's determination that termination was in the best interests of the three older children. However, in determining the best interests of the children, the trial court did not separately address the circumstances of the two younger children, who were then in placement with relatives. Because the trial court was required to consider the best interests of each child individually and was required to explicitly address each child's placement with relatives at the time of the termination hearing if applicable, the trial court clearly erred by failing to do so, and remand for that purpose was necessary.

Affirmed with respect to RO, AM1, and AM2; affirmed in part with respect to DM1 and DM2, best-interest analysis with respect to DM1 and DM2 vacated, case remanded for further proceedings.

PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — BEST-INTEREST ANALYSIS — CONSIDERATIONS.

Once a statutory ground for termination has been proved, the trial court must find that termination is in the child's best interests before it can terminate parental rights; in deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advan-

> tages of a foster home over the parent's home; the trial court has a duty to decide the best interests of each child individually; although in most cases it will be in the best interests of each child to keep brothers and sisters together, if keeping the children together is contrary to the best interests of an individual child, the best interests of that child will control; a trial court's failure to explicitly address whether termination is appropriate in light of the child's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal (MCL 712A.19b[5]; MCR 3.977[E][4]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Daniel P. Gunderson*, Assistant Attorney General, for the Department of Human Services.

Brandi N. Taylor for W. Metts.

Trish Oleksa Haas for the minor children.

Before: K. F. KELLY, P.J., and WILDER and BOONSTRA, JJ.

PER CURIAM. Respondent, W. Metts, appeals as of right a circuit court order terminating her parental rights to her minor children pursuant to MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (c)(*i*), (c)(*ii*), (g), (j), and (k)(*iii*). We affirm the trial court's order with respect to the minors RO, AM1, and AM2. With respect to the minor twins, DM1 and DM2, we affirm the portion of the circuit court's order determining that at least one statutory ground supported termination, but vacate the court's best-interest analysis and remand for further consideration of that issue.

I. BASIC FACTS

Respondent is the mother AM1, RO, AM2, and the twins. The twins are of different paternity than the

other children. The trial court first acquired jurisdiction over the two eldest children in 2007, following a Department of Human Services (DHS) petition for temporary custody alleging that RO had been "found poorly cared for, diapers not changed," and that "the mother threatened to whoop the baby." The petition further alleged that respondent was homeless, the whereabouts of respondent's only other child at the time, a girl, AM1, were unknown, and no suitable relatives were available for placement. At the preliminary hearing, respondent "made admissions . . . sufficient for the court to take temporary jurisdiction of the children . . . based on evidence of improper supervision and environmental neglect." The court placed the children in foster care and directed respondent "to begin anger management and counseling and have a psychological eval[uation]" pending the dispositional hearing.

The trial court entered the initial dispositional order in January 2008. The children were continued in foster care, and respondent was directed to participate in services, including parenting classes, individual counseling, anger management, and family counseling if recommended; she was also directed to obtain suitable housing and a legal source of income. Respondent was granted "unsupervised weekend and overnight visits with goal of reunification with mom within six weeks[.]"

Respondent made progress toward being reunited with her children. She secured suitable housing and a job, and began attending parenting classes, anger-management classes, and individual therapy. However, individual parenting time was terminated in June 2008 after respondent failed to seek medical attention for the children and left the children with a person who was not authorized to baby-sit them. Respondent was also arrested and lost her job and home in May 2008, and

began moving between various housing situations, including a shelter. Respondent developed a pattern of verbal disputes followed by evictions from temporary housing.

Respondent eventually secured somewhat more stable housing and cash and food assistance. She also gave birth to her third child, a boy, AM2, in 2009. The court authorized the DHS to return the two eldest children, AM1 and RO, to respondent with in-home services as long as her housing situation was appropriate and "mother's drug screens are negative." Respondent continued to work well with DHS, and the court terminated its jurisdiction in October 2009. The twins were born in January 2010 and remained in respondent's custody.

The DHS filed another petition for temporary custody in March 2011 following allegations of physical child abuse by respondent and her mother. Respondent admitted to pushing her eldest child, AM1, and scratching her face, and admitted that her mother, Kim Parks, who had a criminal history of felony assault convictions, had been living with her and the children for about three months. Respondent admitted that "she had observed Kim Parks being physically aggressive towards the children" and that "she had noticed changes in her children's behaviors since Kim Parks came to reside in their home."

Respondent pleaded no contest to the allegations against her and admitted physical child abuse occurring on several occasions. She also admitted that she had been previously diagnosed with "psychiatric issues" and was not currently taking her prescribed medication. Respondent was evaluated by a counselor from the court's Clinic for Child Study and was given a poor prognosis concerning her ability to provide all five of her children a safe and

stable environment. At the dispositional hearing, the foster-care worker testified that respondent had been preoccupied or overwhelmed during supervised visits, although the children had a warm relationship with her. Multiple witnesses also testified about respondent's continuing problem with anger management, including several incidents of angry outbursts and at least one incident in which DHS personnel had to call the police to remove respondent from her anger-management class. At the time of the hearing, respondent was incarcerated for disturbing the peace as a result of that incident. Testimony was also taken from multiple witnesses who indicated that the children had begun to internalize and model her aggressive behavior.

Respondent indicated her willingness to continue to attend therapy and anger-management classes and take psychiatric medication. The trial court found that several statutory grounds for termination of parental rights had been demonstrated by clear and convincing evidence and that termination of respondent's parental rights was in the children's best interests.

II. STANDARD OF REVIEW

A court may terminate a respondent's parental rights if one or more of the statutory grounds for termination listed in MCL 712A.19b(3) have been proven by clear and convincing evidence. Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights. MCL 712A.19b(5); MCR 3.977(E)(4). "We review for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest" under MCL 712A.19b(5). *In re Trejo Minors*,

462 Mich 341, 356-357; 612 NW2d 407 (2000); see also MCR 3.977(K). A trial court's decision is clearly erroneous "[i]f although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (citations and quotation marks omitted; alteration in original).

III. STATUTORY GROUNDS FOR TERMINATION

We conclude that the trial court did not clearly err by finding that grounds for termination under MCL 712A.19b(3)(j) were established by clear and convincing legally admissible evidence. See *In re Utrera*, 281 Mich App 1, 16-17; 761 NW2d 253 (2008); MCR 3.977(E)(3) and (K). The evidence showed that respondent had been struggling with her anger-management problem for years. She received treatment for that problem when the two eldest children were previously court wards, and again in 2010 and early 2011. Nevertheless, she was unable to control her anger, even after she resumed her anger-management classes in May 2011. She flew into a rage during a June 2011 family visit and was arrested for disturbing the peace in August 2011 after an altercation with a teacher and the police. The evidence showed that the older children were mimicking respondent's behavior. Therefore, the trial court could properly find that the children were reasonably likely to be harmed if returned to respondent's home. Only one statutory ground for termination need be established. *In re CR*, 250 Mich App 185, 207; 646 NW2d 506 (2002).

IV. BEST-INTEREST DETERMINATION

In deciding whether termination is in the child's best interests, the court may consider the child's bond to the

parent, see *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004), the parent's parenting ability, see *In re Jones*, 286 Mich App 126, 129-130; 777 NW2d 728 (2009), the child's need for permanency, stability, and finality, see *In re VanDalen*, 293 Mich App 120, 141-142; 809 NW2d 412 (2011), and the advantages of a foster home over the parent's home, *In re Foster*, 285 Mich App 630, 634-635; 776 NW2d 415 (2009). "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5); see also MCR 3.977(E)(4).

We hold that the trial court has a duty to decide the best interests of each child individually. See *Foskett v Foskett*, 247 Mich App 1, 11; 634 NW2d 363 (2001); see also *In re HRC*, 286 Mich App 444, 457; 781 NW2d 105 (2009). Although "in most cases it will be in the best interests of each child to keep brothers and sisters together . . . , if keeping the children together is contrary to the best interests of an individual child, the best interests of that child will control." *Wiechmann v Wiechmann*, 212 Mich App 436, 440; 538 NW2d 57 (1995); see also *Foskett*, 247 Mich App at 11. While *Foskett* and *Wiechmann* were child custody disputes in which the children's best interests were analyzed under the framework of the Child Custody Act, MCL 722.21 *et seq*., the same principle—that each child be treated as an individual—applies with equal force in termination-of-parental-rights cases under the juvenile code, MCL 712A.1 *et seq*. It is, therefore, incumbent on the trial court to view each child individually when determining whether termination of parental rights is in that child's best interests.

The evidence showed that respondent loved her children and that the three older children loved her. The evidence also showed that respondent struggled to cope with five children, was unable to control her temper to the detriment of the children, lacked a source of income, had lost her home, and was in jail. Respondent failed to derive any lasting benefit from services previously provided and there were no additional services that could be provided. We conclude that the evidence supported the trial court's determination that termination was in the best interests of RO, AM1, and AM2.

However, because "a child's placement with relatives weighs against termination under MCL 712A.19a(6)(a)," the fact that a child is living with relatives when the case proceeds to termination is a factor to be considered in determining whether termination is in the child's best interests. *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010). Although the trial court may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child's best interests, *In re IEM*, 233 Mich App 438, 453; 592 NW2d 751 (1999), overruled on other grounds by *In re Morris*, 491 Mich 81; 815 NW2d 62 (2012); *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991), the fact that the children are in the care of a relative at the time of the termination hearing is an "explicit factor to consider in determining whether termination was in the children's best interests," *Mason*, 486 Mich at 164. A trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal. *Mason*, 486 Mich at 163-165; *In re Mays*, 490 Mich 993, 994 (2012).

The trial court did not expressly address the fact that the two youngest children were residing with a paternal

relative. Because the trial court was required to consider the best interests of each child individually and was required to explicitly address each child's placement with relatives at the time of the termination hearing if applicable, *Mason*, 486 Mich at 164; *Mays*, 490 Mich at 994, we conclude that the trial court clearly erred by failing to do so. Therefore, we vacate the trial court's best-interest analysis with respect to the twins, and remand this case to the trial court for further proceedings not inconsistent with this opinion.

Affirmed with respect to the minor children RO, AM1, and AM2. Affirmed in part, vacated in part, and remanded for further proceedings with respect to the minor children DM1 and DM2. We do not retain jurisdiction.

K. F. KELLY, P.J., and WILDER and BOONSTRA, JJ., concurred.

STAND UP FOR DEMOCRACY v SECRETARY OF STATE

Docket No. 310047. Submitted May 17, 2012, at Detroit. Decided June 8, 2012, at 9:00 a.m. Convening of special panel declined, 297 Mich App 801. Reversed, 492 Mich 588.

Stand Up For Democracy, a ballot question committee, filed an original action in the Court of Appeals against the Secretary of State and the Board of State Canvassers, seeking a writ of mandamus directing the board to certify a referendum petition the committee had circulated and directing the Secretary of State to take all appropriate action to ensure that the referendum was placed on the November 2012 general election ballot. Citizens for Fiscal Responsibility, a ballot question committee opposing the referendum, moved to intervene. The Court granted the motion to intervene in an unpublished order, entered May 11, 2012 (Docket No. 310047). Stand Up For Democracy sought a referendum on the Local Government and School District Fiscal Accountability Act, 2011 PA 4, MCL 141.1501 *et seq*., commonly known as the "emergency financial manager law," and submitted more than 24,000 referendum petition sheets containing 226,339 signatures to the Bureau of Elections. The bureau determined that more than enough valid signatures had been submitted to have the question placed on the ballot. Citizens for Fiscal Responsibility timely challenged the petition before the board on several grounds, including that the type size of the heading on the petition did not comply with MCL 168.482(2), which requires that referendum petition headings be printed in capital letters in 14-point boldfaced type. Two members of the board voted in favor of a motion to approve the petition. Two members of the board voted against the motion. Accordingly, the motion failed and the petition was not certified. Stand Up For Democracy subsequently filed its complaint for a writ of mandamus in the Court of Appeals and moved for immediate consideration of the complaint and oral argument. The Court granted the motions in an unpublished order, entered May 7, 2012 (Docket No. 310047).

The Court of Appeals *held*:

The petition heading was not printed in 14-point type. Certification is compelled, however, under the decision in *Bloomfield*

Charter Twp v Oakland Co Clerk, 253 Mich App 1 (2002), because the petition substantially complied with the 14-point-type requirement. *Bloomfield* was wrongly decided but must be followed pursuant to MCR 7.215(J)(1). Were it not for *Bloomfield*, the Court would have held that the petition was invalid. Convening a special panel of the Court of Appeals was requested under MCR 7.215(J)(3) for the purpose of resolving the conflict that would have been created except for the provisions of MCR 7.215(J)(1).

1. Although MCL 168.544d permits the Secretary of State to prescribe a petition form for the countywide circulation of referendum petitions, like the petition involved in this case, the statute further provides that the prescribed form must be in substantial compliance with MCL 168.482, 168.544a, or 168.544c, whichever is applicable. The format that has been prescribed by the Secretary of State with regard to a petition subject to MCL 168.482, the statute applicable to the petition in this case, mandates the use of the exact type size and text format as mandated by MCL 168.482(2), which provides that a petition heading shall be printed in capital letters in 14-point boldfaced type. The term "shall" denotes mandatory conduct.

2. Substantive constitutional challenges regarding the validity of a ballot proposal are premature when made before the voters adopt the proposition in question, but challenges regarding whether a petition meets the necessary constitutional or statutory requirements are properly brought before the board certifies any petition as valid. Because Citizens for Fiscal Responsibility's challenges concern the threshold determination whether the petition meets the prerequisites for acceptance, its challenges are ripe for review.

3. The term "font" is defined as a complete assortment of type of one style and size. "Font" incorporates all the characteristics of a particular type, including the font family, such as Times New Roman, Calibri, or Arial, its size, and its style. "Font" is not a unit of measurement. Because the heading of the petition was properly in bold and in capital letters, the only dispute in this case was whether the heading was sized appropriately as 14-point type. Type that is 14-point is $^{14}/_{72}$ of an inch or 0.194 inches. Because 14-point is a unit of measurement easily determined by the use of an E-scale ruler, neither the Court of Appeals nor the board requires expert testimony to determine whether the correct measurement has been met.

4. The actual size of text varies depending on the font family chosen. For example, 14-point Calibri font measures in a different type size than 14-point Arial font. Therefore, text in a so-called

14-point font may not necessarily meet the 14-point type standard of $^{14}/_{72}$ inches. Because a heading of 14-point type is prescribed by the Secretary of State and MCL 168.482(2), text that does not measure 14 points, or $^{14}/_{72}$ inches, is insufficient under the statute. The Calibri font utilized in plaintiff's petition's heading is smaller than the prescribed 14-point-type measurement of $^{14}/_{72}$ inches and only measures 12 points on an E-scale ruler. Therefore, plaintiff's petition contains a fatal formatting defect and is invalid under the format prescribed by the Secretary of State and MCL 168.482. However, *Bloomfield* compels certification of the petition because the 12-point type of the heading is in substantial compliance with the 14-point-type heading requirement prescribed by the Secretary of State and MCL 168.482(2).

5. Under the substantial-compliance doctrine adopted in *Bloomfield*, as a general principle, all doubts regarding technical deficiencies or failure to comply with the exact letter of procedural requirements are resolved in favor of permitting the people to vote and express their will on any proposal subject to election. The doctrine also examines whether the petition language appears in sufficiently clear terms so that those signing the petition can be assumed to have understood to what it was they were appending their signatures. *Bloomfield* was wrongly decided because it failed to apply the clear and unambiguous statutory language in MCL 168.482(5) that the petition's warning language "shall" be printed in 12-point type. The Legislature's use of the word "shall" denotes mandatory conduct and a court may not ignore the Legislature's instruction of mandatory conduct or make a different policy choice than the one made by the Legislature.

6. The plain language of MCL 168.544d requires that petitions circulated countywide must strictly comply with the form requirements prescribed by the Secretary of State, who has prescribed form requirements exactly the same as those required by MCL 168.482.

7. The synopsis of the legislation involved provided by plaintiff on the petition complies with the Secretary of State's requirements for a synopsis. Where, as here, the summary of the emergency financial manager's powers are not misstated, a finding that the synopsis is adequate must follow.

8. The petition was not defective on the basis that it did not republish the prior emergency financial manager act that 2011 PA 4 repealed.

9. Citizens for Fiscal Responsibility abandoned its claims that the petition was defective on the bases that it did not republish the effective date of 2011 PA 4 and the contents of 2011 PA 9, which

was tie-barred to 2011 PA 4, because it failed to provide any authority in support of the claims.

Elements for mandamus met and Board of State Canvassers directed to certify plaintiff's petition for the ballot.

The Sanders Law Firm P.C. (by *Herbert A. Sanders*), *Melvin Butch Hollowell*, *John C. Philo*, and *Goodman & Hurwitz PC* (by *William H. Goodman* and *Julie Hurwitz*) for Stand Up For Democracy.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, and *Heather S. Meingast* and *Denise C. Barton*, Assistant Attorneys General, for the Secretary of State and the Board of State Canvassers.

Honigman Miller Schwartz and Cohn LLP (by *John D. Pirich* and *Andrea L. Hansen*) for Citizens for Fiscal Responsibility.

Amici Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Laura L. Moody* and *Mark G. Sands*, Assistant Attorneys General, for the Governor and the Attorney General.

Mark P. Fancher, *Michael J. Steinberg*, and *Kary L. Moss* for the American Civil Liberties Union Fund of Michigan.

Before: WILDER, P.J., and K. F. KELLY and RIORDAN, JJ.

PER CURIAM. In this original action, plaintiff, Stand Up For Democracy, seeks a writ of mandamus against defendants, the Michigan Secretary of State and the Michigan Board of State Canvassers (the board). Plaintiff urges this Court to direct that defendants certify for

placement on the November 2012 general election ballot a referendum of 2011 PA 4, MCL 141.1501 *et seq*., the Local Government and School District Accountability Act, commonly known as the "emergency financial manager law." Under this Court's decision in *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1; 654 NW2d 610 (2002), which controls the outcome in this case, plaintiff's request for a writ of mandamus is warranted. However, for the reasons stated later in this opinion, we conclude that *Bloomfield* was wrongly decided, and we apply and follow it only because we are required to do so under MCR 7.215(J)(1). Therefore, in accordance with MCR 7.215(J)(2), we call for the convening of a special panel of this Court pursuant to MCR 7.215(J)(3). This judgment is issued pursuant to MCR 7.215(F)(1), and execution is stayed pending a poll of the judges of this Court pursuant to MCR 7.215(J)(3)(a).

I

A

In early 2011, the Michigan Legislature passed, and the Governor signed into law, 2011 PA 4 (the act). The act, which has the purpose of assuring the fiscal accountability of local governments, including school districts, provides for the management and control of local governments' finances in financial emergencies. Among other things, the act sets forth the duties of various officials, including the powers and duties of an emergency manager. The act became effective on March 16, 2011. See MCL 141.1501 *et seq*.

The act repealed 1990 PA 72, MCL 141.1201 *et seq.*, which also described the duties of emergency managers. It is undisputed that the act grants broader powers to emergency managers than did 1990 PA 72.

B

The Michigan Constitution reserves to Michigan voters the power of referendum to approve or reject a newly enacted law:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.
>
> * * *
>
> The Legislature shall implement the provisions of this section. [Const 1963, art 2, § 9.]

As instructed by our Constitution,[1] the Legislature prescribed the form of referendum and other petitions, which is located in MCL 168.544d and provides the following:

> Nominating petitions for the offices under this act and petitions for a constitutional amendment, initiation of

[1] Whereas the 1963 Constitution dictates that the Legislature shall prescribe the form and other requirements of initiative and referendum petitions, in the predecessor 1908 Constitution, the prescribed form of initiative and referendum petitions was governed by the language of the Constitution itself. See Const 1908, art 5, § 1.

> legislation, or referendum of legislation or a local proposal may be circulated on a countywide form. *Petitions circulated countywide shall be on a form prescribed by the secretary of state*, which form shall be substantially as provided in [MCL 168.482, 168.544a, or 168.544c] whichever is applicable. The secretary of state may provide for a petition form larger than 8–1/2 inches by 13 inches and shall provide for identification of the city or township in which the person signing the petition is registered. The certificate of the circulator may be on the reverse side of the petition. This section does not prohibit the circulation of petitions on another form prescribed by this act. [Emphasis added.]

MCL 168.482(2), in turn, provides:

> If the measure to be submitted proposes a . . . referendum of legislation, the heading of each part of the petition *shall be prepared in the following form and printed in capital letters in 14–point boldfaced type*:
>
> * * *
>
> REFERENDUM OF LEGISLATION
>
> PROPOSED BY INITIATIVE PETITION
>
> [Emphasis added.][2]

Pursuant to MCL 168.544d, the Secretary of State issued a memorandum in January 2011 prescribing the requirements for initiative and referendum petitions, including the proper format, the applicable deadlines for submission, as well as signature and circulation requirements. The memorandum provided that for referendum petitions, 161,305 valid signatures[3] were required to be filed no more than 90 days after the final

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[2] Before it was amended in 1965, § 482 required the petition heading to "be prepared in the following form and printed in capital letters in type of the *approximate* size set forth." (Emphasis added.) See 1954 PA 116.

[3] The Secretary of State's requirement is consistent with the constitutional mandate that the minimum number of signatures needed for a

adjournment of the legislative session at which the law was enacted, and that upon the certification of the filing of sufficient valid signatures, the law involved is suspended pending the outcome of the referendum at the next general election.[4] The Secretary of State's memorandum also stated, in relevant part:

> Michigan election law, MCL 168.544d, grants the Secretary of State the authority *to prescribe a petition form* for the countywide circulation of initiative and referendum petitions. MCL 168.544d further provides that *the prescribed form* must be in substantial compliance with MCL 168.544c and MCL 168.482 -- two additional provisions of Michigan election law which address the formatting of petitions.
>
> As a service to those interested in launching an initiative or referendum petition drive, the Michigan Department of State's Bureau of Elections offers its staff for consultations on the various petition formatting requirements. Upon determining through the consultation process that an initiative or referendum petition is properly formatted, it is submitted to the Board of State Canvassers for approval as to form. While Michigan election law does not require the pre-approval of an initiative or referendum petition form, *such approval greatly reduces the risk that signatures collected on the form will be ruled invalid due to formatting defects*.

* * *

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referendum petition is five percent of the total number of votes cast for all candidates for governor at the last preceding general election. Const 1963, art 2, § 9.

[4] This requirement is consistent with MCL 168.477(2), which provides:

> For the purposes of the second paragraph of section 9 of article II of the state constitution of 1963, a law that is the subject of the referendum continues to be effective until the referendum is properly invoked, which occurs when the board of state canvassers makes its official declaration of the sufficiency of the referendum petition. The board of state canvassers shall complete the canvass of a referendum petition within 60 days after the petition is filed with the secretary of state, except that one 15–day extension may be granted by the secretary of state if necessary to complete the canvass.

> Under Board of State Canvassers' policy, the attached "Printer's Affidavit" must accompany an initiative or referendum petition submitted for Board approval. The petition sponsor is responsible for having the affidavit completed.
>
> A description of the *prescribed* initiative and referendum petition format and the pertinent provisions of the State Constitution and Michigan election law are included with this informational packet for your reference. [Emphasis added.]

In June 2011, the Secretary of State issued a follow-up memorandum, which described in detail the "PRESCRIBED FORMAT" for initiative and referendum petitions. Part I of the June 2011 document states, in pertinent part, that referendum petitions "shall" contain "[t]he full text of the legislation which would be affected by the referendum." This full text is to appear "at the top of the signature side of the petition sheet after an introduction which identifies the legislation involved." However,

> [i]f there is not sufficient space at the top of the signature side of the petition sheet to print the legislation which would be affected by the referendum, the introduction shall be followed by a brief synopsis of the legislation involved and reference shall be made to the reverse side of the sheet for the full text of the legislation. The full text of the legislation which would be affected by the referendum shall appear on the reverse side of the petition sheet after an introduction which identifies the legislation involved.

In addition, the Secretary of State's standard *prescribed* format, under the subheading "Identification of Petition Type," specifies that the words "REFERENDUM OF LEGISLATION PROPOSED BY INITIATIVE PETITION" "*shall* be printed in capital letters in *14-point boldface type* on the left margin of the signature

side of the sheet or at the top of the signature side of the sheet. (MCL 168.482(2)).” (Emphasis added.) Significantly, while § 544d permits the Secretary of State to prescribe a form that is in substantial compliance with § 482, in this instance, the Secretary of State's *prescribed* format did *not* permit petition type size or text that was in substantial compliance with MCL 168.482(2). Rather, the format prescribed by the Secretary of State mandated the use of the *exact* type size and text format as mandated by MCL 168.482(2).

As previously noted, the Secretary of State also required a “Printer's Affidavit” to accompany referendum petitions submitted for board approval. A sample printer's affidavit was attached to the Secretary of State's January 2011 memorandum, dictating the manner in which the printer should aver that the text of a proposed petition meets the prescribed criteria. The top of the sample printer's affidavit contains the following language:

> PROPONENTS OF INITIATIVE AND REFERENDUM PETITIONS ARE URGED TO SUBMIT A PROOF COPY OF THEIR PETITION TO THE BOARD OF STATE CANVASSERS FOR APPROVAL AS TO FORM PRIOR TO THE CIRCULATION OF THE PETITION. WHEN SUBMITTING A PETITION FORM FOR APPROVAL, THE BOARD REQUESTS THAT THIS AFFIDAVIT BE ATTACHED.

Despite the Secretary of State's recommendations in the two memoranda and sample printer's affidavit that proponents seek preapproval of a petition with regard to form, plaintiff elected not to do so. Instead, plaintiff circulated its petition without seeking advance assurance that the format of its petition complied with the Secretary of State's requirements.

C

On February 29, 2012, plaintiff filed over 24,000 sheets containing 226,339 signatures for a referendum on the act. The Bureau of Elections ultimately concluded that plaintiff had submitted over 203,000 valid signatures and reported to the board that the petition contained a sufficient number of valid signatures.

Despite the Secretary of State's reference to the board's requirement that a printer's affidavit be submitted at the time the petition is filed, plaintiff submitted a letter from a printer, which the board rejected. Thereafter, plaintiff submitted a printer's affidavit on March 14, 2012, which provided, in pertinent part:

> 3. THAT THE HEADING OF THE PETITION IS PRESENTED IN THE FOLLOWING FORM AND PRINTED IN CAPITAL LETTERS IN 14-POINT BOLDFACE TYPE:
>
> **REFERENDUM OF LEGISLATION**
>
> **PROPOSED BY INITIATIVE PETITION**

On April 9, 2012, intervening defendant, Citizens for Fiscal Responsibility (CFR), a ballot question committee, timely challenged the petition on several grounds, including the type size of the heading. CFR asserted that the type size of the petition heading did not comply with the requirement of MCL 168.482(2) that it be printed in 14-point boldfaced type. CFR also asserted that plaintiff's summary of the petition was incomplete and misleading, the petition omitted the prior law that will be revived if the act is suspended, the petition omitted the effective date of the act, and the petition omitted reference to 2011 PA 9, a bill related to collective bargaining that was tie-barred to the act.

CFR submitted two affidavits from commercial printers with its challenge. Each of the commercial printers

asserted that not only did the petition heading submitted by plaintiff fail to conform to the 14-point-type-size standard, but, in fact, the text was smaller than required.

Plaintiff disputed CFR's assertion that the petition failed to comply with all the necessary formatting requirements. In support of its response, plaintiff presented a notarized affidavit from a printer attesting that the heading of the petition was in 14-point type. Plaintiff further argued that even if the heading type size was not 14-point, the petition heading substantially complied with the requirements. Plaintiff added that the remaining challenges by CFR were not within the jurisdiction of the board.

D

The board heard CFR's challenge on April 26, 2012. Director of Elections Christopher Thomas opined that the board's approval authority did not extend to the substance of the proposal, but rather was limited to whether the petition's format satisfied statutory requirements on a technical basis. Thomas acknowledged that CFR had presented two affidavits asserting that the heading was not in 14-point boldfaced type and that plaintiff had provided one affidavit asserting that the heading was compliant. Thomas advised the board that, in the past, it has reviewed such challenges for compliance with MCL 168.482 of the Michigan Election Law. Thomas also advised the board that previous caselaw had held that the board's duties were limited to determining whether the form of a petition substantially complied with the statutory requirements.

After statements by counsel for plaintiff and CFR, the board heard statements from two printers produced by plaintiff who each asserted that the petition's head-

ing meets the 14-point-size requirement. Bruce Hack, who holds a Bachelor of Science degree in printing management from the Rochester Institute of Technology and has decades of experience in the printing field, stated, in pertinent part:

> Basically when you're talking about 14-point type, you're talking about an area that's just less than a fifth of an inch, .194. And it becomes a canvas that a type designer gets to work with, and sometimes they use the whole canvas and sometimes they use part of the canvas. The particular type that was used for this petition, called Calibri, was designed by a Lucas DeGroot. He's probably 50 years old right now. And it became -- as I investigated more, it became the standard in Microsoft software in 2007.

Hack indicated that he used a computer program, rather than a ruler, to determine whether the text was in 14-point type:

> When I was asked to sign the affidavit, I took the file that we were given, that we had assembled for printing purposes, and I used a program -- because we're in the digital age -- and it's called PDF Suite. And I went in and I verified that it was 14-point and it was 12-point and it was 8-point. And just the other day I did a printout, a print screen, to show how I verified the type sizes. . . . [T]here is no way that you can just measure a capital letter and determine what the type size is. So every time you go to your computer and you say, hey, I'm going to use 14-point, you click on it, and depending on what type font you use will determine the strength [sic] of the letter that you're going to see; the overall height of the capital letters, the descenders, et cetera.

Printer Michael Migrin, a 1971 graduate of Ferris State College in the field of graphic reproduction technology, stated his opinion that the petition heading is in 14-point type. He indicated that actual type size can vary: "Now if you would look at every one of these

manufacturers, their sizes are a little different and their styles are a little different. It all depends who the manufacturer is." Rather than a ruler, Migrin used a printer's "cell" and a magnifying glass to measure the type size: "So I would invite anybody to take this cell and have a ten-power magnifying glass and to lay this cell onto this typeface here and compare if it is 14-point or not." He stated that every time something is printed, a slight change occurs from the original, so minute differences will occur. He demonstrated the differences between two point sizes, one a 12-point and the other a 14-point, and stated, "[I]f you look at it closely, you can see there's a slight difference in the shoulder on the type. And if you look at the character, the characters themselves are almost the same height, yet there's a shoulder which we refer to as the internal leading. This will give you a little better example of what I'm talking about as far as how the difference can vary."

Board member James Waters moved that the board approve the petition because it complied with the required number of signatures and with the other statutory requirements. His motion included a rejection of the challenge. Board Chairperson Julie Matuzak seconded his motion. Member Norman Shinkle, the board's vice chairperson, believed that a legitimate question existed regarding the size of the words and cited *Tea Party v Bd of State Canvassers*, unpublished order of the Court of Appeals, entered August 30, 2010 (Docket No. 299805).[5] Member Jeffrey Timmer said that he found no wiggle room in the statutory term "shall" so that the board was bound by that term. Waters and Matuzak voted in favor of certifying the

[5] Because *Tea Party* is an unpublished order, it is not binding precedent under MCR 7.215(C)(1).

petition; Shinkle and Timmer voted against certifying the petition. Because of the board's tie vote, the petition was not certified.[6]

E

Plaintiff thereafter filed the instant complaint for mandamus in this Court. In its brief in support of expedited consideration, plaintiff argues that "[*t*]*he type size of the petition heading was in 14 point font* . . . in accordance with MCL 168.482(1)," and that, therefore, it has a clear legal right to certification of the petition and defendants have a clear duty to certify the petition. Plaintiff argues in the alternative that even if the heading is not 14-point, under the relevant caselaw, only substantial compliance with the type-size requirement is necessary, and the petition heading substantially complies with the 14-point-type requirement. Plaintiff also maintains that the act of certifying the petition is ministerial and states that it has no other legal or equitable remedy. Plaintiff contends that CFR's additional challenges were not within the jurisdiction of the board, which had no authority to review the merits of the referendum, and that to the extent that the challenges should be reviewed, they are devoid of legal merit.

Defendants, the board and the Secretary of State, together answer that, although the board has a legal duty to declare the sufficiency or insufficiency of plaintiff's petition, the board was unable to pass a motion to do so given the deadlock. Defendants admit that the Constitution, the Michigan Election Law, and instruc-

[6] See MCL 168.22d(2), which provides: "Three members of the board of state canvassers constitute a quorum of the board. However, an action of the board of state canvassers shall only be effective upon concurrence of at least 1 member of each major political party appointed to the board."

tions from the Secretary of State do not require a particular font for petitions, but defendants also assert that these authorities do not indicate how type size should be measured in the event of a dispute. Defendants further contend that there is uncertainty in the law with respect to whether the board may review the type size of petitions under a substantial-compliance standard.

CFR intervened in the mandamus action[7] and argues that the board had a clear legal duty to deny the certification of the petition, on the basis that the petition heading is "nonconforming on its face" because it does not meet the 14-point-type-size requirement, a defect that could have been remedied before circulation of the petition if plaintiff had followed the standard protocol to obtain preapproval of the petition form. CFR also argues that plaintiff cannot rely on the substantial-compliance standard because the statute's mandatory language ("shall") requires the heading to be of 14-point type. Additionally, CFR contends that the summary of the proposal is incomplete and misleading. Finally, CFR states that plaintiff failed to completely republish the prior act, the effective date of the act, and the public act tie-barred to the act.

In their amici curiae brief, the Governor and the Attorney General assert that plaintiff's petition does not comply with the mandatory requirements of MCL 168.482 because the heading is not in 14-point type. They further maintain that modern computer software fonts cannot be equated to the long-established printer's standard adopted by the Legislature in 1954 and to which the statute continues to adhere. In the view of

[7] We granted CFR's motion to intervene in *Stand Up for Democracy v Secretary of State*, unpublished order of the Court of Appeals, entered May 11, 2012 (Docket No. 310047).

the Governor and the Attorney General, there is no evidence that the Legislature ever contemplated allowing the measurement standards established in MCL 168.482 to be flexibly applied because of the variability in text size inherent in diverse and evolving word-processing technology. Finally, the Governor and the Attorney General contend that the only way to verify type size is by using an E-scale printer's ruler and that plaintiff either should have used such a ruler to ensure that the type met the standard or, alternatively, that plaintiff should have obtained preapproval from the Secretary of State to establish compliance with the statute.

The American Civil Liberties Union Fund of Michigan (ACLU) also filed an amicus curiae brief and argues that plaintiff's petition is compliant with all statutory requirements. Alternatively, ACLU claims that even if the petition heading does not strictly comply with the statutorily mandated type size, the petition heading substantially complies with the statutory requirements, and certification of the referendum petition should occur without regard to the substance of the proposed referendum or any technical deficiencies that have little or no effect on signers of the petition.

II

A

This Court has jurisdiction over an original action for mandamus against a "state officer." MCR 7.203(C)(2), citing MCL 600.4401. For purposes of mandamus, the Secretary of State and the board are "state officers." *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282; 755 NW2d 157 (2008), aff'd in result only 482 Mich 960 (2008). Further, the

Michigan Election Law provides that a person aggrieved by a decision of the board may seek relief in the form of mandamus. MCL 168.479.[8]

B

This Court reviews de novo as questions of law whether a defendant has a clear legal duty to perform and whether a plaintiff has a clear legal right to the performance sought. See *In re MCI Telecom Complaint*, 460 Mich 396, 442-443; 596 NW2d 164 (1999). Issues regarding the application of a statute are questions of law. *Danse Corp v Madison Hts*, 466 Mich 175, 178; 644 NW2d 721 (2002). Courts review questions of law under a de novo standard of review. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). Additionally, this Court reviews de novo issues of statutory interpretation. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003); *Robert A Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 474-475; 760 NW2d 526 (2008).

When we interpret a statute, the primary goal must be to ascertain and give effect to the Legislature's intent, and the judiciary should presume that the Legislature intended a statute to have the meaning that it clearly expresses. *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217-218; 801 NW2d 35 (2011). This Court determines legislative intent by examining the language used. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). Statutory provisions are to be read in the context of the

[8] MCL 168.479 provides: "Any person or persons, feeling themselves aggrieved by any determination made by said board, may have such determination reviewed by mandamus, certiorari, or other appropriate remedy in the supreme court."

entire act, giving every word its plain and ordinary meaning. *Driver v Naini*, 490 Mich 239, 247; 802 NW2d 311 (2011). Judicial construction is not permitted when the language is clear and unambiguous. *Id.* Courts apply unambiguous statutes as written. *Id*.

C

CFR makes various challenges to the adequacy of plaintiff's submitted referendum petition. Plaintiff argues that at least some of these challenges concern the merits of the referendum petition, which the board had no jurisdiction to consider, and that, accordingly, this Court should also decline to review the challenges. This Court reviews de novo matters concerning the threshold question of justiciability, including whether a matter is ripe for review. *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363, 369; 716 NW2d 561 (2006), overruled on other grounds in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 371 n 18 (2010).

While challenges regarding the *substance* of petitions have historically been viewed as premature if brought before the initiative legislation comes into effect, see *Hamilton v Secretary of State*, 212 Mich 31; 179 NW 553 (1920), such is not the case for challenges regarding the legality or sufficiency of the *form of the petitions* themselves, *Leininger v Secretary of State*, 316 Mich 644; 26 NW2d 348 (1947). In other words, any substantive constitutional challenges regarding the validity of a ballot proposal are premature when made before the voters adopt the proposition in question. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 288. But challenges regarding whether a petition meets the necessary constitutional or statutory requirements are properly brought before the board certifies any petition as valid. *Id.* at 288-289. Our Supreme Court has stated

that in a referendum context, as we have here, a controversy is ripe for review when its resolution "is not dependent upon the Board of Canvassers' counting or consideration of the petitions but rather involves a threshold determination whether the petitions" meet the prerequisites for acceptance. *Mich United Conservation Clubs v Secretary of State*, 463 Mich 1009 (2001). CFR's challenges probe this "threshold determination" because they contend that the petitions failed to comply with the form required by law. As a result, all of CFR's challenges are ripe for review.

III

A plaintiff has the burden of establishing entitlement to the extraordinary remedy of a writ of mandamus. *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 520; 810 NW2d 95 (2011). The plaintiff must show that "(1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy." *White-Bey v Dep't of Corrections*, 239 Mich App 221, 223-224; 608 NW2d 833 (1999).

The parties do not dispute that if CFR's challenges to plaintiff's petition are rejected, plaintiff's entitlement to a writ of mandamus will have been established. If we determine that the petition qualifies for certification, plaintiff would have a clear legal right to have the board certify the petition, the board would have a clear legal duty to do so, the act would be ministerial because it would not require the exercise of judgment or discretion, and plaintiff would have no other legal or equitable remedy available. See *Citizens Protecting Michigan's Constitution*, 280 Mich App at 291-292. Hence, we

focus our attention solely on whether the petition meets the requirements for certification.

IV

A

1

CFR, the Attorney General, and the Governor argue that plaintiff does not have a clear legal right to the performance of any duty by the board on the basis that the referendum petition heading does not meet the statutory requirements and, therefore, the petition is defective. We agree that the petition heading does not comply with the format prescribed by the Secretary of State or the format required by MCL 168.482(2), but as discussed later in this opinion, under *Bloomfield*, this finding is not dispositive in the instant case.

As we noted earlier, MCL 168.544d provides, in part, that "[p]etitions circulated countywide shall be on a form prescribed by the secretary of state, which form shall be substantially as provided in" § 482. Here, both the Secretary of State's January 2011 memorandum and MCL 168.482(2) require that the heading be in all capital letters and that it *shall* be prepared in *14-point boldfaced type*. The term "shall" denotes mandatory conduct. *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008). Importantly, neither the Secretary of State nor the statute use the term "font." "Font" is defined as "a complete assortment of type of one style and size." *Random House Webster's College Dictionary* (2d ed, 1997). "Font" incorporates all of the characteristics of a particular type, including the font family,[9] its size, and its style. For

[9] Examples of font families include Times New Roman, Calibri, Arial, and so forth. See Microsoft typography, <http://www.microsoft.com/typography/fonts/family.aspx> (accessed June 7, 2012).

example, while they share the same font family, 12-point boldfaced Arial is one particular font, while 12-point italicized Arial is a different font. The statute specifies that the heading must be in capital letters and have (1) a particular size (14 points) and (2) a particular style (boldfaced). Because the heading was properly in bold and in capital letters, the only dispute is whether the heading was sized appropriately as 14-point type. The affidavits submitted by plaintiff and CFR conflict regarding the type size of the heading and, therefore, do not resolve the dispute.

The term "14-point" also is not defined by the Secretary of State's memoranda or by statute. When construing statutes, technical words that have acquired a peculiar and appropriate meaning must be construed according to that particular meaning. *Ford Motor Co v Woodhaven*, 475 Mich 425, 439; 716 NW2d 247 (2006), citing MCL 8.3a. Because there is no statutory definition for the term "point," it is proper to consult a dictionary for its common meaning. *Klooster v Charlevoix*, 488 Mich 289, 304; 795 NW2d 578 (2011). The *Random House Webster's College Dictionary* (2d ed, 1997) defines "point" in the printing context as "a unit of type measurement equal to . . . ($\frac{1}{72}$ inch)." Originally created by French typesetter Pierre Fournier in 1737, the measurement of a printer's "point" as $\frac{1}{72}$ of an inch is a centuries-old standard. Saxena, *Headline Writing* (New Delhi, India: Sage Publications India Pvt Ltd., 2006), p 206. Therefore, type that is "14-point" is $\frac{14}{72}$ of an inch, or as acknowledged by the various experts in this case, 0.194 inches.[10]

[10] Because 14-point is a unit of measurement easily determined by use of an E-scale ruler, neither this Court nor the board requires expert testimony to determine whether the correct measurement has been met.

It is clear from the record evidence that plaintiff's petition's heading is printed in Calibri, the current default family in Microsoft software. It is further undisputed that the font was categorized by the Microsoft software as "14-point." However, as conceded by the printers and by plaintiff in this case, the actual size of text varies depending on the font family chosen. In other words, "14-point" Calibri font measures in a different *type size* than "14-point" Arial font. Therefore, text in a so-called 14-point *font* may not necessarily meet the 14-point *type* standard of $^{14}/_{72}$ inches.[11] Because a heading of 14-point type is plainly and unambiguously prescribed by the Secretary of State and MCL 168.482(2), text that does not measure 14 points, or $^{14}/_{72}$ inches, is insufficient under the statute. Here, the Calibri font utilized in plaintiff's petition's heading is smaller than the prescribed 14-point-type measurement of $^{14}/_{72}$ inches. In fact, the heading on plaintiff's petition only measures 12 points on an E-scale ruler. Thus, plaintiff's petition contains a fatal formatting defect, and the petition is invalid under the Secretary of State's prescribed format and MCL 168.482.[12]

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[11] Because "font" is defined as "a complete assortment of type of one style and size," "font" is *not* a unit of measurement.

[12] Plaintiff claimed in its motion to supplement the record that before the board's April 26, 2012, hearing, Director of Elections Thomas had been provided an expert opinion from Professor Chris Corneal, Associate Professor of Graphic Design at Michigan State University, that the heading size was accurate and that he improperly failed to submit that information to the board. Although we have denied plaintiff's motion to supplement the record, *Stand Up for Democracy v Secretary of State*, unpublished orders of the Court of Appeals, entered May 14, 2012, and June 8, 2012 (Docket No. 310047), we believe that it is important to note here that Director Thomas was only told what the record already reveals, that the heading was in 14-point Calibri *font*. Because the font utilized by plaintiff fails to comply with the required measurement of 14-point *type*, plaintiff's contention that Director Thomas withheld information from

2

Our inquiry does not end here, however. As we previously noted, plaintiff argues in the alternative that the form of the petition substantially complies with the statutory requirements and that under this Court's decision in *Bloomfield* certification is warranted. We agree that *Bloomfield* compels certification of the referendum petition in this case because the 12-point type of plaintiff's petition heading is in substantial compliance with the 14-point-type heading requirement prescribed by the Secretary of State in the January 2011 memorandum and dictated in MCL 168.482(2). However, because we conclude that *Bloomfield* was wrongly decided, we explain the rationale in *Bloomfield* and our disagreement with it.

The petition at issue in *Bloomfield* was for the initiation of an election to decide whether the intervening defendant, the city of Pontiac, could annex township property.[13] Under MCL 42.2a and MCL 42.34(5), after the circulation and signature of annexation petitions, the petitions are to be filed with the county clerk. MCL 42.2a provides that such petitions are subject to MCL 168.488. MCL 168.488 explains that these petitions are subject to the requirements of MCL 168.482(1), (4), (5), and (6). In addition, MCL 168.482(6) incorporates the requirements of MCL 168.544c(1) and (2).

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the board that was relevant to and supportive of plaintiff's request for certification of its petition simply is inaccurate.

[13] The township initially challenged the petition before the special election, but the circuit court declined to enjoin that election on the ground that the township had the adequate legal remedy of a postelection quo warranto action. The election occurred, and Pontiac voters approved the annexation by a vote of 5,879 to 1,086; the township voters in the annexed area voted 14 in favor and 8 against. *Bloomfield*, 253 Mich App at 9.

Bloomfield Township asserted, *inter alia*, that the petition's warning language was not in the 12-point boldfaced type required by MCL 168.544c(1) and MCL 168.482(5). The circuit court denied relief to the township. *Bloomfield*, 253 Mich App at 4-9, 21. On appeal, the *Bloomfield* Court adopted the "substantial compliance" doctrine articulated in *Meridian Charter Twp v East Lansing*, 101 Mich App 805, 810; 300 NW2d 703 (1980), and affirmed the circuit court. Under the substantial-compliance doctrine, " '[a]s a general principle, all doubts as to technical deficiencies or failure to comply with the exact letter of procedural requirements are resolved in favor of permitting the people to vote and express their will on any proposal subject to election.' " *Bloomfield*, 253 Mich App at 21, quoting *Meridian*, 101 Mich App at 810. The substantial-compliance doctrine also examines whether "the petition language appears 'in sufficiently clear terms so that those signing the petition can be assumed to have understood to what it was they were appending their signatures.' " *Bloomfield*, 253 Mich App at 21, quoting *Meridian*, 101 Mich App at 810.

In affirming the lower court's conclusion that the petition was valid and that the annexation election should proceed, the *Bloomfield* Court acknowledged that "the relevant Michigan Election Law provisions clearly and unambiguously require that various components shall appear within a petition for annexation," and that the "annexation petition[] undisputedly contained several variations from the statutorily prescribed language." *Bloomfield*, 253 Mich App at 20, 22. Nevertheless, applying the substantial-compliance doctrine as articulated in *Meridian*, the Court found that the petition was properly certified as valid despite the failure of the petition to strictly comply with statutory petition requirements. *Id.* at 24-25. In the *Bloomfield*

Court's view, "the township has failed to direct our attention to any section of the Michigan Election Law or any other legislative act suggesting that the filing of a technically imperfect petition necessarily precludes an election regarding the matter therein addressed." *Id.* at 22. Thus, in contravention of the plain language of MCL 168.482(5) that the petition's warning "shall be printed in 12-point type," the *Bloomfield* Court applied the substantial-compliance doctrine "in this case involving [an] imperfect petition[], absent the Legislature's instruction that a petitioned-for election will be precluded unless the initiating petition[] exactly match[es] the Michigan Election Law requirements for form and content." *Id.* at 23.

In our judgment, *Bloomfield* was wrongly decided because it failed to apply the clear and unambiguous statutory language that the petition's warning language "*shall* be printed in 12-point type immediately above the place for signatures" as required by MCL 168.482(5). (Emphasis added.) The Legislature's use of the word "shall" denotes mandatory conduct, *Manuel*, 481 Mich at 647, and a court may not ignore the Legislature's instruction of mandatory conduct or make a different policy choice than what has already been made by the Legislature, *People v McIntire*, 461 Mich 147, 152-153; 599 NW2d 102 (1999) (" '[O]ur judicial role precludes imposing different policy choices than those selected by the Legislature . . . . When a legislature has unambiguously conveyed its intent in a statute, . . . the proper role of a court is simply to *apply* the terms of the statute . . . .' ") (citation omitted). The *Bloomfield* Court's conclusion that initiating petitions need not exactly match the Michigan Election Law requirements for form and content ignored the Legislature's use of the term "shall," a clear expression of its intent that the form of an initiating petition must be in

a specified type, and constituted an improper failure to recognize and defer to a legislative mandate.

In the instant case, the expression of legislative intent is even clearer. As we earlier mentioned, the Legislature amended MCL 168.482(2) in 1965 by striking the language permitting the petition heading to be in "type of the approximate size set forth" and replaced it with the mandatory language, "shall be . . . in 14-point boldfaced type." The inescapable conclusion to be derived from this amendment is that the Legislature no longer wished to permit heading type of an indefinite size, but instead intended to require the heading to be a uniform, standardized dimension—that of 14-point type, or $^{14}/_{72}$ inches.

In sum, under the plain language of MCL 168.544d, petitions being circulated countywide must strictly comply with the form requirements prescribed by the Secretary of State. Although the form requirements prescribed by the Secretary of State need only substantially comply with the sections enumerated in MCL 168.544d, in this instance, the Secretary of State's prescribed form requirements are the exact same form requirements as those mandated by MCL 168.482. Thus, but for MCR 7.215(J)(1), which requires us to follow the holding in *Bloomfield*, we would conclude that the petition heading is fatally defective, that plaintiff has no clear legal right to certification of the referendum for placement on the November 2012 ballot, and that the board is mandated to reject the petition as invalid.

B

CFR also argues that the summary in plaintiff's referendum petition is incomplete and misleading and

that, accordingly, the board was required to deny certification of the petition. We disagree.

The Secretary of State's January 2011 memorandum prescribed that the full text of the affected legislation must appear on a referendum petition. However, it further provided that

> [i]f there is not sufficient space at the top of the signature side of the petition sheet to print the legislation which would be affected by the referendum, the introduction shall be followed by a brief synopsis of the legislation involved and reference shall be made to the reverse side of the sheet for the full text of the legislation. The full text of the legislation which would be affected by the referendum shall appear on the reverse side of the petition sheet after an introduction which identifies the legislation involved.

The brief synopsis provided by plaintiff on the petition states:

> A PETITION for a referendum election to repeal Public Act 4 of 2011, which allows the governor to declare a local government or school district in receivership and appoint an emergency manger to take control with the following powers, among others: to assume the powers of local elected officials; to take control of revenue and spending; to terminate, modify and renegotiate contracts; to refuse to bargain with employee representatives; to take control of employee pension funds under certain circumstances; and with the governor's approval, to sell public assets or dissolve a city, township or county.

We conclude that the synopsis complies with the Secretary of State's requirements. The summary accurately states that the emergency manager has particular powers. Contrary to CFR's contention, the summary does not state that the emergency manager will exercise all those powers or suggest that the emergency manager will exercise the granted powers on a whim. CFR's argument that the language of a referendum *petition*

must meet similar requirements for the *ballot* language used for constitutional amendments is misplaced. There is nothing in the Michigan Constitution or in the statutory scheme that supports this argument. The constitution requires the *ballot* language for constitutional amendments to

> contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment. [Const 1963, art 12, § 2.]

Notably, the Constitution does not identify any such requirements for the *petition* language for a constitutional amendment. Instead, the Constitution provides that "[a]ny such *petition* shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." *Id*. (emphasis added). Therefore, CFR's argument that the "true and impartial" reference in the Constitution applies to petition language is not persuasive.

CFR does not contend that the emergency manager's duties summarized in the petition are not within the emergency manager's powers. Instead, it argues that certain conditions must be present before the emergency manager may exercise those powers. Where the summary does not misstate the powers of the emergency manager under the act, a finding that the synopsis is adequate must follow. See *Coalition to Defend Affirmative Action & Integration v Bd of State Canvassers*, 262 Mich App 395, 406; 686 NW2d 287 (2004) (finding that petition language was not "propaganda" or misleading because the summaries did not introduce anything that was not found in the language of the proposed amendment).

C

CFR next argues that the petition is defective because the petition did not republish the prior emergency financial manager act, 1990 PA 72 (PA 72). We disagree.

CFR contends that because 2011 PA 4, the legislation at issue in the referendum, repealed 1990 PA 72, PA 72 would again govern in the event of the suspension of PA 4 pending the outcome of the referendum at the election, and that given this effect of the referendum, PA 72 was required to be republished along with PA 4. In asserting this view, CFR relies on the following provision in the format prescribed by the Secretary of State's January 2011 memorandum:

> If the petition offers a legislative proposal or a referendum of legislation which involves alterations to existing provisions of Michigan law, the alterations may be presented by showing any language that would be added to the provision or provisions in capital letters and any language that would be deleted from the provision or provisions struck out with a line.

CFR's reliance on this section is misplaced. First, 1990 PA 72 is not an "*existing* provision[] of Michigan law" because it was repealed once 2011 PA 4 became effective in March 2011. Second, the Secretary of State's prescribed format states that such alterations to legislation *may* be shown by strikeouts and capital letters. The use of the word "may" designates a permissive provision. *Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993). Therefore, CFR's challenge based on the fact that 1990 PA 72 was not republished must be rejected.

D

CFR next argues that the petition is defective because it failed to republish the effective date of 2011 PA 4. CFR

claims that, although the petition correctly reflects that PA 4 was given immediate effect, "[p]laintiff's failure to identify the Effective Date and otherwise comply with the requirement to fully republish the act sought to be repealed is a fatal error, warranting denial of certification as to form." Because CFR failed to provide any authority to support its claim that an act's effective date is part of the act itself and therefore must also be published in a referendum petition, this issue is abandoned. *DeGeorge v Warheit*, 276 Mich App 587, 596; 741 NW2d 384 (2007). Moreover, we have failed to locate any authority that requires an act's effective date to be published in a referendum petition. As a result, CFR's argument fails.

E

Finally, CFR argues that the petition should not be certified because it also failed to publish the contents of Senate Bill 158 ("SB 158"). We disagree.

2011 PA 4 (Enrolled House Bill No. 4214) was tie-barred to 2011 PA 9 (Enrolled Senate Bill No. 158). As enacted, 2011 PA 4 stated, in part, that "[t]his act does not take effect unless Senate Bill No. 158 of the 96th Legislature is enacted into law." Likewise, SB 158 as enacted stated, in part, that "[t]his amendatory act does not take effect unless House Bill No. 4214 of the 96th Legislature is enacted into law." CFR claims that the tie-bar of these two bills requires 2011 PA 9 to also have been published on the referendum petition. CFR failed to cite any authority in support of this contention. Accordingly, we consider the issue abandoned. *DeGeorge*, 276 Mich App at 596. Even if we were to consider the argument, however, we would conclude that the argument lacks merit. The Secretary of State's June 2011 memorandum requires "[t]he full text of *the*

legislation which would be affected by the referendum" to appear in the petition. (Emphasis added.) Notably, publication of "the" legislation affected, not "any" or "all" legislation affected, is required. The plain reading of the Secretary of State's requirement in the context of a referendum petition establishes that "the" refers only to the subject of the referendum, in this case 2011 PA 4.

Reynolds v Bureau of State Lottery, 240 Mich App 84; 610 NW2d 597 (2000), supports this interpretation of the Secretary of State's memorandum. In *Reynolds*, this Court explained, "According to the Michigan Constitution, the people reserve the right to refer 'laws enacted by the legislature . . . .' Const 1963, art 2, § 9. The 'law' referred to by our constitution can only be *a definite, specific act* . . . ." *Reynolds*, 240 Mich App at 97 (emphasis added). Moreover, "when a law enacted by the legislature is referred to the people, the reference is of a particular definite act and not, by implication, the general principle or subject matter at issue in the act." *Id.* (quotation marks, brackets, and citation omitted). Moreover, " ' "[n]owhere in the Constitution can be found even a suggestion that a referendum petition has any effect except the nullification of *the particular measure referred* until its approval by the voters.' " *Id.* at 94, quoting *Mich Farm Bureau v Secretary of State*, 379 Mich 387, 396; 151 NW2d 797 (1967), quoting *McBride v Kerby*, 32 Ariz 515, 523; 260 P 453 (1927) (emphasis added). Thus, given the prior precedent of this Court and the Supreme Court, we hold that the Secretary of State's requirements do not require any other act to be published in the petitions other than the act that is the direct subject of the referendum.

In addition, the tie-bar language of 2011 PA 9 required only that 2011 PA 4 must have been enacted into law in order for 2011 PA 9 to "take effect." Unquestion-

ably, this condition was satisfied on March 16, 2011, when both 2011 PA 4 and 2011 PA 9 became effective. The tie-bar language did not state, however, that 2011 PA 9 would "remain" in effect only as long as 2011 PA 4 is effective. In other words, the tie-bar language addressed when the act could *come into existence*, but the tie-bar language had no bearing or influence after that incident or condition occurred, and once both acts became effective, the two acts were no longer contingent upon each other. See OAG, 1979-1980, No 5478, p 129 (April 4, 1979) ("Tie-barred statutes are statutes which do not become operative until the happening of a contingency, the passage of another statute."). If the Legislature had intended a more permanent linkage between the two acts, it could have used more expansive language to make clear that 2011 PA 9 would remain in effect only as long as 2011 PA 4 remained in effect.

We recognize that two subsections of 2011 PA 9 (subsections 8 and 9) would appear to be made inoperable if 2011 PA 4 is repealed because these sections both refer to 2011 PA 4 by its name, "the Local Government and School District Fiscal Accountability Act":

> (8) Collective bargaining agreements under this act may be rejected, modified, or terminated pursuant to *the local government and school district fiscal accountability act*. This act does not confer a right to bargain that would infringe on the exercise of powers under *the local government and school district fiscal accountability act*.
>
> (9) A unit of local government that enters into a consent agreement under *the local government and school district fiscal accountability act* is not subject to subsection (1) for the term of the consent agreement, as provided in *the local government and school district fiscal accountability act*. [Emphasis added.]

Regardless, the fact that subsections 8 and 9 of 2011 PA 9 would become inoperable with the repeal of 2011 PA 4

does not constitute the repeal of these subsections. See *Reynolds*, 240 Mich App at 94 (the only effect of a referendum is to nullify "the particular measure referred") (quotation marks and citations omitted).

Therefore, we reject CFR's final challenge to the validity of plaintiff's referendum petition.

V

In summary, under *Bloomfield*, plaintiff's petition substantially complies with the statutory requirements to the extent that plaintiff has a clear legal right to certification of the petition. Defendants have a clear duty to certify the petition for the ballot because the petition has the requisite number of signatures and meets all other statutory requirements. Under all the circumstances presented here, the act of placing the petition on the ballot is ministerial. Plaintiff does not have an alternate legal remedy. The elements of mandamus thus have been met and we direct the board to certify plaintiff's petition for the ballot. However, as we have indicated, but for the fact that we are required to follow *Bloomfield* under MCR 7.215(J)(1), we would rule that plaintiff's petition is invalid because the petition heading is noncompliant with the 14-point type mandated by the Secretary of State and MCL 168.482(2). Furthermore, because of the invalid petition heading, we would find that plaintiff has no clear legal right to certification of the referendum for placement on the November 2012 ballot, and therefore, we would direct the board to not certify plaintiff's petition for the ballot.

Because *Bloomfield* is determinative of the outcome of this case, we follow it as we must under MCR 7.215(J)(1), and we call for the convening of a special panel of this Court pursuant to MCR 7.215(J)(3). This

judgment is issued pursuant to MCR 7.215(F)(1) and execution is stayed pending the poll of the judges of this Court pursuant to MCR 7.215(J)(3)(a).

WILDER, P.J., and K. F. KELLY and RIORDAN, JJ., concurred.

PEOPLE v JONES

Docket No. 303753. Submitted June 5, 2012, at Detroit. Decided June 19, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 918.

Jeffrey Lamar Jones was convicted by a jury of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and one count each of assaulting, resisting, or obstructing a police officer, causing serious impairment of bodily function, MCL 750.81d(3), carjacking, MCL 750.529a, second-degree fleeing and eluding a police officer, MCL 750.479(a)(4)(a), third-degree fleeing and eluding a police officer, MCL 750.479a(3), felonious driving, former MCL 257.626c, assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), failure to stop at the scene of a personal injury accident, MCL 257.617a, operating a motor vehicle with a suspended or revoked license, MCL 257.904(1), and possession of marijuana, MCL 333.7403(2). In 1996 when defendant was a juvenile, a juvenile court judge waived jurisdiction from the juvenile court to the circuit court, thereby allowing the prosecution of defendant as an adult, MCL 712A.4(1), after which he pleaded *nolo contendere* to a charge of assault with intent to murder, MCL 750.83. Although he was convicted of a felony as an adult, that trial court exercised its discretion under former 769.1(3) and sentenced him as a juvenile. The 1996 conviction served as one of the predicate felonies to support sentencing defendant as a third-offense habitual offender, MCL 769.11. Defendant appealed.

The Court of Appeals *held*:

1. Under MCL 769.34(1) a claim of scoring error or that the trial court relied on inaccurate information when determining the sentence must be preserved by raising the issue at sentencing, in a motion for resentencing, or in a proper motion to remand in the Court of Appeals. Defendant's motion to remand for resentencing was not timely filed in the Court of Appeals and, therefore, was not a proper motion to remand. Because his claim of sentencing error was not preserved, it is reviewable for plain error affecting defendant's substantial rights.

2. When reviewing a statute, courts assume that the Legislature intended the plain meaning of clear and unambiguous lan-

guage and must enforce the statute as written. A court will not read anything into a statute that is not within the manifest intention of the Legislature as gathered from the act itself. Sentence enhancement is permitted under MCL 769.11(1) if a defendant has been convicted of two or more felonies or attempts to commit felonies. Any person who assaults another person with intent to commit the crime of murder is guilty of a felony. MCL 750.83. Defendant was properly sentenced as a third-offense habitual offender. Defendant's 1996 *nolo contendere* plea to a charge of assault with intent to murder was accepted by the circuit court following his waiver from juvenile court and he was thus clearly convicted in that court of a felony. MCL 769.11(1) allows enhancement on the basis of prior felony convictions without regard to the sentence imposed. Accordingly, defendant's 1996 adult conviction of assault with intent to murder that resulted in a juvenile sentence was correctly used as one of the predicate offenses for sentencing as an habitual offender under MCL 769.11(1).

3. There is sufficient evidence to support defendant's carjacking conviction. The police officer had attempted to remove the keys from the ignition of the officer's vehicle and arrest defendant when defendant put the car into drive and stepped on the gas pedal. Defendant's arguments on appeal regarding this conviction are erroneously based on a previous version of the carjacking statute that required that the offense occur in the presence of the person or a passenger of the person whose car was stolen. The current version of MCL 750.529a does not require that the owner or driver of the car be present inside the car at the time of the initial larceny in order for the larceny to constitute a carjacking.

Affirmed.

SENTENCES — HABITUAL-OFFENDER ENHANCEMENTS — PREDICATE OFFENSES — ADULT CONVICTIONS RESULTING IN JUVENILE SENTENCES.

Sentence enhancement is permitted under MCL 769.11(1) if a defendant has been convicted of two or more felonies or attempts to commit felonies, and that enhancement is allowed on the basis of prior felony convictions without regard to the sentence imposed for the prior felony convictions; an adult felony conviction that results in a juvenile sentence may be used as one of the predicate felony offenses for sentencing as an habitual offender.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Train-

ing, and Appeals, and *Madonna Georges*, Assistant Prosecuting Attorney, for the people.

Jonathan B. D. Simon for defendant.

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM. Defendant, Jeffrey Lamar Jones, appeals as of right his jury convictions of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and one count each of assaulting, resisting, or obstructing a police officer, causing serious impairment of bodily function, MCL 750.81d(3), carjacking, MCL 750.529a, second-degree fleeing and eluding a police officer, MCL 750.479a(4)(a), third-degree fleeing and eluding a police officer, MCL 750.479a(3), felonious driving, former MCL 257.626c, assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), failure to stop at the scene of a personal injury accident, MCL 257.617a, operating a motor vehicle with a suspended or revoked license, MCL 257.904(1), and possession of marijuana, MCL 333.7403(2).

Defendant was sentenced, as a third-offense habitual offender, MCL 769.11, to 10 to 20 years' imprisonment for each conviction of assault with intent to do great bodily harm less than murder, 15 to 30 years' imprisonment for assaulting, resisting, or obstructing a police officer, causing serious impairment of bodily function, 30 to 50 years' imprisonment for carjacking, 10 to 20 years' imprisonment for second-degree fleeing and eluding a police officer, 5 to 10 years' imprisonment for third-degree fleeing and eluding a police officer, 2 to 4 years' imprisonment for felonious driving, and 2 to 4 years' imprisonment for assaulting, resisting, or obstructing a police officer. Defendant was sentenced to the time he had already served for his convictions of

failure to stop at the scene of a personal injury accident, operating a motor vehicle with a suspended or revoked license, and possession of marijuana.

Because we conclude that the enhancement of defendant's sentence was not error and that there was sufficient evidence to support defendant's carjacking conviction, we affirm.

I. SENTENCING ENHANCEMENT

Defendant argues that the trial court erred when it sentenced him, pursuant to MCL 769.11, as a third-offense habitual offender, because one of the predicate felonies relied on by the trial court was committed by defendant when he was a juvenile, and despite having jurisdiction waived from the juvenile court to the circuit court, defendant ultimately was sentenced as a juvenile for the offense.

Claims of scoring error or that the trial court relied on inaccurate information when determining a sentence must be preserved by raising the issue at sentencing, in a motion for resentencing, or in a "proper motion to remand" filed with this Court. MCL 769.34(10). Defendant filed a motion to remand; however, the motion was not timely filed with this Court. Accordingly, defendant's motion to remand was not a "proper motion to remand," and this issue is unpreserved. See *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). We review unpreserved, constitutional error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763.

Resolution of the issue on appeal here requires interpretation of the statutory provision that allows

defendant's sentence to be enhanced on the basis of his habitual-offender status. Pursuant to MCL 769.11(1), upon conviction of a felony, a defendant may be subject to an enhanced sentence if he has already been "convicted of any combination of 2 or more felonies or attempts to commit felonies."

The proper construction of a statute is an issue that we review de novo. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). The goal of statutory construction is "to ascertain and give effect to the intent of the Legislature." *Id.* (citation and quotation marks omitted). We assume that the Legislature intended the plain meaning of clear and unambiguous statutory language, and we enforce such a statute as written. *Id.*

In 1996, after jurisdiction was waived from the juvenile court to the circuit court for prosecution of defendant as an adult,[1] defendant entered a *nolo contendere* plea to a charge of assault with intent to murder, MCL 750.83. The events giving rise to defendant's plea occurred in 1994, when defendant was 16 years old. The trial court accepted defendant's plea. At that time trial courts had discretion regarding whether to sentence a juvenile waived to the circuit court as an adult or as a juvenile pursuant to MCL 769.1(3).[2] In this

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[1] Juvenile defendants are treated like adult defendants when jurisdiction is waived pursuant to MCL 712A.4(1), which provides:

> If a juvenile 14 years of age or older is accused of an act that if committed by an adult would be a felony, the judge of the family division of circuit court in the county in which the offense is alleged to have been committed may waive jurisdiction under this section upon motion of the prosecuting attorney. After waiver, the juvenile may be tried in the court having general criminal jurisdiction of the offense.

[2] At the time of defendant's sentencing for the conviction of assault with intent to murder, former MCL 769.1(3)—later amended by 1996 PA 247, effective January 1, 1997—provided:

case, the trial court exercised its discretion and sentenced defendant as a juvenile.[3]

On appeal, defendant argues that the peculiar circumstances of this case do not permit the use of his admitted felony conviction as a predicate offense for sentencing as an habitual offender because a juvenile sentence was imposed as a result of that felony conviction. Whether an adult conviction resulting in a juvenile sentence can be used as a predicate offense for sentencing as an habitual offender pursuant to MCL 769.11 is an issue of first impression.[4]

Here, it is not disputed that the circuit court accepted defendant's *nolo contendere* plea to a charge of assault with intent to murder. Pursuant to MCL 750.83, "[a]ny person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years." Thus, it is clear that following his waiver from the juvenile court, defendant was convicted in the circuit court of a felony when the trial court accepted his plea to the charge of assault with intent to murder.

> A judge of a court having jurisdiction over a juvenile shall conduct a hearing at the juvenile's sentencing to determine if the best interests of the juvenile and the public would be served by placing the juvenile on probation and committing the juvenile to a state institution or agency described in the youth rehabilitation services act . . . or by imposing any other sentence provided by law for an adult offender.

[3] According to defendant's presentence investigation report, defendant was committed to the Department of Social Services for placement until age 19.

[4] In support of his position, defendant relies on *People v McIntire*, 7 Mich App 133, 140; 151 NW2d 187 (1967), while the prosecution relies on *People v McGilmer*, 95 Mich App 577; 291 NW2d 128 (1980). Although both cases address peculiar issues regarding the sentencing of juveniles, a close reading of both cases reveals that neither case is directly on point or helpful to the resolution of the issue in this case.

We find the fact that MCL 769.11(1) focuses only on whether a defendant has been convicted, and does not contain any language regarding a defendant's sentence, controlling. This Court "will not read anything into a statute that is not within the manifest intention of the Legislature as gathered from the act itself; rather, the Legislature is presumed to have intended the meaning it plainly expressed." *People v St John*, 230 Mich App 644, 648; 585 NW2d 849 (1998). MCL 769.11(1) permits sentence enhancement if a defendant has been "convicted of any combination of 2 or more felonies or attempts to commit felonies." Therefore, we conclude that because defendant was convicted of two felonies before he was convicted of the instant offenses,[5] the trial court did not err when it enhanced his sentence pursuant to MCL 769.11(1).

II. SUFFICIENCY OF THE EVIDENCE

Defendant also argues that there was insufficient evidence to sustain his conviction of carjacking. Specifically, defendant argues that the evidence does not support the conclusion that the police officer involved was present when defendant gained possession of the officer's vehicle.

We review de novo a claim of insufficient evidence. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). The evidence is viewed in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proved beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010).

[5] It is not disputed that defendant was also previously convicted of third-degree fleeing and eluding, "a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000, or both . . . ." MCL 750.479a(3).

Defendant's argument on appeal appears to be based on the prior version of Michigan's carjacking statute. In 2004, the Legislature amended the carjacking statute. The former version of the statute, MCL 750.529a, provided that a person was guilty of carjacking if he or she

> by force or violence, or by threat of force or violence, or by putting in fear robs, steals, or takes a motor vehicle . . . from another person, in the presence of that person or the presence of a passenger or in the presence of any other person in lawful possession of the motor vehicle . . . .

The current version of MCL 750.529a, under which defendant was charged, as amended by 2009 PA No. 128, states that

> [a] person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking . . . .

This Court's goal in construing a statute is "to ascertain and give effect to the intent of the Legislature." *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008) (quotation marks and citation omitted). We determine the Legislature's intent by the plain language of the stature, and clear and unambiguous statutes are enforced as written. *Id.*

Defendant's argument regarding the officer's presence during the offense is erroneously based on the previous version of the statute. Presence is no longer an element of the offense. When it amended the carjacking statute, the Legislature removed the phrase "in the presence of that person or the presence of a passenger or in the presence of any other person in lawful possession of the motor vehicle" and replaced it with the

phrase "any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle." We assume that when the Legislature removed the word "presence" from the carjacking statute it did so intentionally. See *People v Auto Serv Councils of Mich, Inc*, 123 Mich App 774, 787; 333 NW2d 352 (1983) ("It is reasonable to presume some intentionality in the insertion of . . . additional [statutory] language."). Accordingly, that the officer was not present inside the police cruiser at the time defendant took the cruiser is not dispositive because such presence at the time of the initial larceny is not a necessary condition for criminal liability under the amended carjacking statute.

Defendant also asserts that the officer was not lawfully attempting to recover the motor vehicle, but does not explain his basis for this assertion. Contrary to defendant's argument, the evidence established that the officer was attempting to remove the keys from the ignition and arrest defendant when defendant put the car into drive and stepped on the gas pedal. Accordingly, when viewed in the light most favorable to the prosecution, the evidence was sufficient to establish beyond a reasonable doubt that defendant was guilty of carjacking.

Defendant also claims that the officer "attacked" him first, and that defendant was acting in self-defense. Defendant does not cite any controlling authority for the assertion that an arrestee is entitled to respond with force to an officer's lawfully attempting to arrest him or her, nor does defendant point to facts on the record that would suggest that the officer was "attacking" him. Indeed, the record establishes the exact opposite. Defendant assumed control of the officer's police vehicle while the officer pursued him on foot,

close behind. The officer grabbed defendant's arm and told him to get on the ground; defendant responded by striking the officer in the face with a closed fist. The officer's actions did not constitute an "attack" because the officer was attempting to restrain defendant so that defendant could be arrested. "If a police officer lawfully arrests an individual, he may use reasonable force if that individual resists." *Tope v Howe*, 179 Mich App 91, 106; 445 NW2d 452 (1989).

Affirmed.

JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ., concurred.

DEVONAIR ENTERPRISES, LLC v DEPARTMENT OF TREASURY

Docket No. 303785. Submitted April 3, 2012, at Lansing. Decided May 8, 2012. Approved for publication June 19, 2012, at 9:05 a.m.

Devonair Enterprises, LLC, filed a petition in the Tax Tribunal challenging a determination by the Department of Treasury that it was not entitled to elect to pay use tax on receipts from the lease of an airplane in lieu of payment of use tax on the full cost of the airplane under MCL 205.95(4). The Tax Tribunal affirmed respondent's determination. Petitioner appealed.

The Court of Appeals *held*:

1. The Use Tax Act levies on every person in Michigan a specific tax for the privilege of using, storing, or consuming tangible personal property in Michigan at a rate of six percent of the price of the property or services. Under MCL 205.95(4), a lessor may elect to pay use tax on receipts from the rental or lease of the tangible personal property in lieu of payment of sales or use tax on the full cost of the property at the time it is acquired. Under an administrative rule, a person engaged in the business of renting or leasing tangible personal property to others must pay the use tax at the time he or she purchases the property, or the person may report and pay use tax on the rental receipts from the rental. The rule merely clarifies the interrelationship between the relevant statutory provisions and reiterates the statutory election set forth in MCL 205.95(4). Under the act, the burden of paying use tax is on the consumer or purchaser, rather than the seller. Under the option set forth in MCL 205.95(4), the person is merely collecting the use tax from the ultimate consumer or purchaser who is exercising the privilege of use, storage, or consumption. Thus, the requirement set forth in the administrative rule that the person be engaged in the business of renting or leasing tangible personal property to others is consistent with the requirements and objectives set forth in the act. Accordingly, the administrative rule does not impose additional requirements or limit or modify the application of MCL 205.95(4).

2. Under the Use Tax Act, a business is all activities engaged in by a person or caused to be engaged in by a person with the object of gain, benefit, or advantage, either direct or indirect. To have

been engaged in the business of selling tangible personal property for storage, use or other consumption under former MCL 205.95(1), so as to be considered a lessor under MCL 205.95(4), the person must have engaged in the business of selling with the object of gain, benefit, or advantage. The Tax Tribunal found that the only leases that petitioner entered into did not reflect arm's-length transactions and were not indicative of petitioner being engaged in the business of leasing the airplane to others. This finding was supported by the record. Petitioner asserted that it had established a gain, benefit, or advantage through the profitable management of the airplane as an appreciating asset, by providing Federal Aviation Administration compliance and liability control, by protecting the legal interests of other companies, and by allowing for easier transfer of the airplane. However, the gains, benefits or advantages cited by petitioner related more to the reasons petitioner was formed, than to any gain, benefit, or advantage it acquired from actually leasing the airplane. Because petitioner was not engaged in the business of renting or leasing the airplane to others, it was not entitled to make the election provided by MCL 205.95(4). Under the circumstances, the Tax Tribunal properly concluded that petitioner was not eligible to pay tax on its rental receipts in lieu of sales or use tax on the full purchase price of the airplane.

Affirmed.

Suzanne Meiners-Levy and *Barnes & Thornburg LLP* (by *Jeffrey G. Muth*) for Devonair Enterprises, LLC.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Kevin T. Smith*, Assistant Attorney General, for the Department of Treasury.

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM. Petitioner appeals as of right from an order of the Michigan Tax Tribunal (MTT) affirming respondent's assessment of use tax. We affirm.

Petitioner was formed in September 2003 and registered for a use-tax permit, indicating it was in the

business of "equipment leasing." Petitioner's sole member is DJS Enterprise Group, LLC (DJS), which was also formed in September 2003. The sole members of DJS are Donald and Cynthia Smith. On July 31, 2007, petitioner purchased a 2007 Pilatus PC-12 airplane for $3,610,690 and, on the same day, entered into two lease agreements. One lease agreement was with DJS and provided that DJS was to lease the Pilatus for $200 a flight hour, as well as pay all operational costs including maintenance, repairs, insurance, fuel, and storage costs for the airplane. The second lease agreement was with Donald Smith who was to lease the Pilatus for $636 a flight hour, which was later adjusted to $680 a flight hour. Petitioner did not enter into any other lease agreements regarding the Pilatus, which was petitioner's only asset. Petitioner did not pay sales or use tax on the Pilatus at the time of purchase; instead, petitioner claimed that it was entitled to pay use tax on the rental receipts it received from leasing the aircraft pursuant to MCL 205.95(4).

In January 2008, respondent issued a bill for use taxes due based on the purchase price of the Pilatus, in the amount of $207,000, plus a penalty in the amount of $51,750. An informal conference followed before a neutral Hearings Division referee who ultimately recommended that the assessment be upheld. Respondent accepted that recommendation. After respondent issued its final bill for taxes due, petitioner filed its petition for review with the MTT. A hearing followed. Some of the stipulated facts included that (1) in 2007, the Pilatus had 74.4 flight hours, 67.9 from use by DJS and 6.5 from use by Donald, (2) in 2008, the Pilatus had 179 flight hours, 145.8 from use by DJS and 33.3 from use by Donald, and (3) in 2009, the Pilatus had 136.5 flight hours, 110.5 from use by DJS and 26 from use by Donald. Donald testified that he purchased the Pilatus

because it had the best resale value of any plane. He stated that he was planning for this aircraft to be an appreciating asset and that leasing it as a charter to unrelated parties would cause the plane to lose value. Donald also testified that DJS owns a hangar in Ionia, Michigan, where the Pilatus is kept and that he was the only person to pilot the aircraft.

An expert in the aviation industry, Louis Meiners, Jr., testified that, generally, a charter service would charge about $1,300 a flight hour for planes similar to the Pilatus. He further testified that a premium is not paid for a pristine charter aircraft and that the biggest indicator of depreciation is the number of hours that the plane is operated. Other evidence presented at the hearing related to the costs of owning a Pilatus. Presuming 479 flight hours a year, which is fairly typical usage, the fixed and variable costs of owning a Pilatus amount to about $1,580 a flight hour.

Following the hearing, a 59-page proposed opinion and judgment was issued affirming the tax assessed by respondent with credit to be given for remitted tax payments, but disallowing the penalty assessed. The MTT concluded that petitioner was not a "lessor," as set forth in MCL 205.95(4), because it was not "engaged in the business of renting or leasing" aircraft as set forth in Mich Admin Code, R 205.132 (Rule 82). The MTT considered three factors as indicators of whether an entity is engaged in the business of renting or leasing tangible personal property to others: (1) whether the rates and terms of the lease are consistent with leases resulting from an arm's-length transaction, (2) whether the taxpayer holds itself out to the public as a lessor, and (3) whether the amount of time that the property is leased is sufficient to produce revenue consistently with other leasing businesses.

In this case, the MTT concluded, the nominal hourly rate petitioner charged Donald was insufficient to cover the cost of leasing the Pilatus and was not indicative of a leasing business that enters into leases with others, through arm's-length transactions, with a reasonable expectation of gain, benefit, or advantage resulting from the leasing agreement. With regard to the lease agreement between petitioner and DJS, the MTT noted that it required DJS to bear the entire cost of maintenance, repairs, insurance, storage, and fuel even though DJS was granted nonexclusive use of the aircraft and the agreement was terminable at will by petitioner. Thus, even if others rented the aircraft, DJS remained responsible for all such substantial costs and petitioner could terminate the lease immediately after DJS incurred the cost of major repairs. These circumstances, concluded the MTT, were not indicative of a leasing business that enters into leases with others through arm's-length transactions because the terms were exceedingly unfavorable to DJS. And DJS used the aircraft for relatively few hours a year, about 324 flight hours over 27 months or 144 hours a year compared to 290 to 479 hours, which is typical usage of a Pilatus according to aviation publications; thus, petitioner did not have as its object a gain, benefit, or advantage from leasing the Pilatus to DJS.

The MTT also noted that petitioner did not advertise to the public that it was a lessor of aircraft and did not pursue additional leasing agreements with unrelated companies because petitioner wanted to preserve the resale value of the Pilatus for its own purposes. These circumstances, again, indicated that petitioner was not operating as a leasing business—otherwise it would have had incentive to maximize the rental rates and rental hours to recover, at least,

the fixed costs associated with the Pilatus. Further petitioner's annual use-tax returns showed a rate of return of less than one percent on this $3.6 million asset; thus, the leasing agreement terms and actual usage of the Pilatus did not yield revenue consistently with the expectations of a leasing business. The MTT noted that acceptance of petitioner's argument would allow a taxpayer to avoid paying sales or use tax on the purchase price of an aircraft by simply obtaining a use-tax registration, forming an LLC, and leasing the aircraft for a nominal rate and for minimal flight hours to its only member in an effort to acquire and hold the asset with very limited tax liability. As demonstrated here, petitioner's limited rental receipts resulted in petitioner paying minimal use tax compared to the tax that would have been paid at the time this $3.6 million aircraft was purchased.

In summary, the MTT concluded that, considering the two lease agreements as well as petitioner's activities as a whole, petitioner had failed to establish that it was a lessor engaged in the business of leasing the Pilatus to others for its own gain, benefit, or advantage. Rather, petitioner's leases were designed to benefit DJS and Donald. Simply stated, petitioner existed to hold the Pilatus for the personal use of petitioner's sole member, DJS, and the sole members of DJS, Donald and Cynthia Smith. Thus, petitioner was not entitled to elect to pay use tax on the rental payments it received from leasing the aircraft and was liable for use tax on the purchase price of the Pilatus. The MTT rejected petitioner's argument that the proper remedy was to impose use tax on market-value lease rates rather than the purchase price because petitioner failed to qualify for an election under MCL 205.95(4) or Rule 82. Accordingly, the MTT affirmed respondent's assessment of use tax on the purchase price of the Pilatus in the amount

of $207,000, but disallowed the penalty assessed. Subsequently, the proposed opinion and judgment were adopted as the final decision in this case. This appeal followed.

Petitioner argues that the MTT erred by concluding that it was not entitled to elect to pay use tax on receipts from the lease of its Pilatus as provided by MCL 205.95(4) after improperly applying Rule 82, which limited and modified the plain language of MCL 205.95(4) to lessors "engaged in the business of renting or leasing tangible personal property to others . . . ." We disagree.

"In the absence of fraud, review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record." *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994). Further, we review de novo issues of statutory interpretation, but accord respectful consideration to the agency's interpretation. *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 38; 761 NW2d 269 (2008).

MCL 205.93(1) of the Use Tax Act (UTA) provides:

> There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property or services . . . .

Former MCL 205.95(1)[1] provided:

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[1] MCL 205.95(1) was amended by 2007 PA 93, effective December 1, 2007. Because petitioner purchased the airplane before the effective date of the amendment, this opinion addresses the language in former MCL 205.95(1).

> Except as otherwise provided in this subsection or [MCL 205.95(5)], a person engaged in the business of selling tangible personal property for storage, use or other consumption in this state shall register with the department [of Treasury] . . . . Every seller shall source sales in accordance with [MCL 205.110] and collect the tax imposed by this act from the consumer.

MCL 205.95(4) provides:

> A lessor may elect to pay use tax on receipts from the rental or lease of the tangible personal property in lieu of payment of sales or use tax on the full cost of the property at the time it is acquired. For tax years that begin after December 31, 2001, in order to make a valid election under this subsection, a lessor of tangible personal property that is an aircraft shall obtain a use tax registration by the earlier of the date set for the first payment of use tax under the lease or rental agreement or 90 days after the lessor first brings the aircraft into this state.

And Rule 82 states:

> A person engaged in the business of renting or leasing tangible personal property to others shall pay the Michigan sales or use tax at the time he purchases [the property], or he may report and pay use tax on the rental receipts from the rental thereof. [Mich Admin Code, R 205.132.]

In this case, petitioner elected to pay use tax on receipts from the rental of its aircraft, as set forth in MCL 205.95(4), instead of paying sales or use tax on the purchase price when the aircraft was acquired, as set forth in MCL 205.93(1). The MTT held that petitioner could not make that election because it was not a "lessor." According to the MTT, petitioner was not a "lessor" under MCL 205.95(4) because it was not "engaged in the business of renting or leasing tangible personal property to others," as set forth in Rule 82. Petitioner argues that the MTT improperly applied Rule 82, imposing additional requirements by limiting

or modifying the application of MCL 205.95(4) to lessors "engaged in the business of renting or leasing tangible personal property to others," contrary to the plain language of MCL 205.95(4), which requires only that petitioner be a "lessor."

Rule 82, however, neither imposes additional requirements, nor limits or modifies the application of MCL 205.95(4). Former MCL 205.95(1) required that a "person engaged in the business of selling," i.e., a seller, "source sales . . . and collect the tax imposed by this act from the consumer." Under the UTA, a "seller" is defined as "the person from whom a purchase is made . . . ." MCL 205.92(d).[2] And a "purchase" is an acquisition effected by a transfer of possession for consideration, which includes "rental in money." MCL 205.92(e). Similarly, the "purchase price" is the consideration paid by the consumer to the seller for the property leased or rented. MCL 205.92(f).[3] Thus, a "lessor" is a "seller" under the UTA, if the lessor is engaged in the business of "selling," which includes leasing and renting tangible personal property. Accordingly, Rule 82 merely clarifies the interrelationship between MCL 205.93(1), former MCL 205.95(1), and MCL 205.95(4), as well as reiterates the statutory election set forth in MCL 205.95(4).

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[2] "When a statute specifically defines a given term, that definition alone controls." *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).

[3] Statutory provisions of the UTA and the General Sales Tax Act (GSTA), MCL 205.51 *et seq*., are complementary and supplementary. *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 406; 590 NW2d 293 (1999). Accordingly, the definitions set forth in the UTA are consistent with those set forth in the GSTA, which, for example, defines a "sale at retail" as "a sale, lease, or rental of tangible personal property," MCL 205.51(1)(b), and defines "sales price" as consideration "for which tangible personal property or services are sold, leased, or rented," MCL 205.51(1)(d).

Under the UTA, the burden of paying use tax is on the consumer or purchaser, rather than the seller because the purchaser is the party exercising the privilege of use, storage, or consumption. See *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 415-416; 590 NW2d 293 (1999). Thus, pursuant to MCL 205.93(1), a person could pay use tax at the time he or she purchases tangible personal property, because at that time the person is a consumer or purchaser exercising the privilege of use, storage, or consumption. However, pursuant to former MCL 205.95(1), if a person was "engaged in the business of selling"—which under the definitions set forth in the UTA includes leasing and renting—and registered as such, the person could elect instead, under MCL 205.95(4), to pay use tax on receipts from the rental or lease of the tangible personal property. Under this option set forth in MCL 205.95(4), the person is merely collecting the use tax from the ultimate consumer or purchaser who is exercising the privilege of use, storage, or consumption. See *World Book, Inc*, 459 Mich at 415-416. Thus, the requirement set forth in Rule 82 that "[a] person [be] engaged in the business of renting or leasing tangible personal property to others" is consistent with the requirements and objectives set forth in these statutes—the collection of use tax from the ultimate consumer of the personal property. "Agencies have the authority to interpret the statutes they are bound to administer and enforce." *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 240; 501 NW2d 88 (1993). Rule 82 is an interpretative rule that neither conflicts with the governing statutes nor extends or modifies the statutes; thus the rule is valid. See *Guardian Indus Corp v Dep't of Treasury*, 243 Mich App 244, 254; 621 NW2d 450 (2000). Accordingly, petitioner's claim that Rule 82 is inapplicable and that its application by respondent improperly imposed additional require-

ments by limiting or modifying the plain language of MCL 205.95(4) are without merit.

Petitioner also argues that the MTT erroneously denied petitioner the right to elect to pay use tax on receipts from the rental or lease of the Pilatus because the requirements set forth in MCL 205.95(4) were met, including that it was a "lessor." We disagree.

The MTT held that petitioner was not "engaged in the business of selling," former MCL 205.95(1), or, as provided in Rule 82, petitioner was not "engaged in the business of renting or leasing tangible personal property to others," and thus could not elect the option provided under MCL 205.95(4) as a "lessor." MCL 205.92(h) defines "business" as "all activities engaged in by a person or caused to be engaged in by a person with the object of gain, benefit, or advantage, either direct or indirect." The MTT held that, contrary to its claim, petitioner was not a lessor because it was not engaged the business of leasing the Pilatus to others for petitioner's gain, benefit or advantage.

Petitioner argues that it established a gain, benefit, or advantage "through the profitable management of the appreciating asset," "by providing [Federal Aviation Administration] compliance and liability control," "by protecting the legal interests of other companies," and because the business "allowed for easier transfer of the property." In particular, petitioner argues, "there were clear business reasons both for the establishment of [petitioner] as a distinct legal entity as well as the leasing activity," including (1) to acquire an appreciating asset without incurring operating costs, (2) for liability protection so that a creditor of DJS could not attach the aircraft, (3) so that Donald could protect his privacy by registering the aircraft in petitioner's name, and (4) that holding the "aircraft in a separate legal

entity made disposition of the business operation easier in the event that [Donald] chose to sell the business."

However, petitioner's claims of "gain, benefit, or advantage" speak more to the reason petitioner was formed as a separate entity (particularly to benefit Donald) than to any gain, benefit, or advantage petitioner acquired from its alleged business of leasing aircraft. Petitioner obtained a use-tax registration, and thus did not pay tax on the purchase price of the Pilatus, by claiming that it was in the business of leasing equipment, i.e., aircraft. As a consequence, petitioner was required to report, collect from the consumer, and pay use tax on its rental receipts. Petitioner's claims of gain, benefit, or advantage are not endeavors that would generate rental receipts from which use tax would be paid. In fact, Smith testified that he acquired the Pilatus because he planned on it being an appreciating asset and that leasing the aircraft would cause it to lose value. But petitioner avoided paying tax on the aircraft when it was purchased by claiming that it was in the business of *leasing* aircraft, not because it was in the business of holding appreciating assets. The fact that petitioner owns an appreciating asset is irrelevant to its purported business of leasing aircraft. And petitioner's claims that DJS and Donald benefited from the leasing arrangements are of no consequence to the issue whether petitioner itself gained, benefited, or achieved an advantage from its alleged business of leasing aircraft.

To be "engaged in the business of selling tangible personal property for storage, use, or other consumption," former MCL 205.95(1), so as to be considered a "lessor" under MCL 205.95(4), petitioner must have engaged in the business of selling, i.e., selling activities with the object of gain, benefit, or advantage. And Rule 82 provides for

the payment of use tax on rental receipts generated from the "renting or leasing [of] tangible personal property to others . . . ." In this case, the only business or selling activities that petitioner engaged in was a lease agreement with its sole member DJS, and a lease agreement with DJS member Donald. The MTT concluded that these leases did not reflect arm's-length transactions and were not indicative of petitioner being engaged in the business of leasing the Pilatus to others. This finding was supported by the extremely favorable leasing terms with regard to the lease agreement with Donald, as well as by the unreasonable lease terms provided in the DJS agreement. Pursuant to the agreement with Donald, the aircraft was leased at an hourly rate significantly less than the hourly operational costs incurred by petitioner. Pursuant to the DJS agreement, DJS was responsible for all operational costs, including maintenance, storage, insurance, fuel, and repairs, although the lease was nonexclusive and terminable at will by petitioner. Thus, even if other entities leased the aircraft, DJS remained liable for all associated costs. And even if DJS had paid for significant repairs on the aircraft, petitioner could terminate the lease immediately after the repairs were completed.

The MTT's conclusion that petitioner was not in the business of leasing aircraft to others was also supported by the fact that petitioner did not seek out any other leasing opportunities, for example, by advertising its purported aircraft leasing business. As a consequence of petitioner's inactivity, the aircraft was flown a minimal number of hours compared to the typical expectation of between 290 and 479 hours a year, producing little revenue for petitioner. Although petitioner argues on appeal that it did not seek out other leasing opportunities in an effort to preserve the aircraft's resale value, such an objective is not consistent with its claim that it

was engaged in the business of leasing the aircraft to others. See former MCL 205.95(1).

We conclude that the MTT did not err in applying the law and that its factual findings were adequately supported by the evidence on the whole record. See *Mich Bell Tel Co*, 445 Mich at 476. That is, the MTT's conclusion that petitioner was not a "lessor," as set forth in MCL 205.95(4), because it was not "engaged in the business of renting or leasing [the Pilatus] to others," as set forth in Rule 82, is affirmed. Because petitioner was never engaged in that business enterprise, and thus was not entitled to make the election provided by MCL 205.95(4), we reject petitioner's argument that the MTT erred by holding that petitioner is liable for use tax on the full purchase price of the Pilatus.

Affirmed.

FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ., concurred.

PEOPLE v EARL

Docket No. 302945. Submitted June 12, 2012, at Detroit. Decided June 19, 2012, at 9:10 a.m. Leave to appeal granted, 493 Mich 945.

Ronald L. Earl was convicted by a jury in the Oakland Circuit Court of bank robbery and two counts of possession of less than 25 grams of a controlled substance. The crimes had occurred in March 2010. The court, Leo Bowman, J., required defendant to pay a $130 crime victim's assessment fee under MCL 780.905(1)(a) as amended by 2010 PA 281, effective December 16, 2010. Defendant appealed.

The Court of Appeals *held*:

1. The United States and Michigan Constitutions both prohibit unreasonable searches, but to attack the propriety of a search and seizure, the defendant must first establish that he or she has standing to challenge the search. Standing exists if, considering the totality of the circumstances, the defendant had a legitimate expectation of privacy in the object of the search and seizure and that expectation is one that society is prepared to recognize as reasonable. When a vehicle stop is legal, a passenger with no property or possessory interest in the vehicle does not have standing to contest the search of the vehicle. In this case, defendant did not dispute the legality of the police stop of his fiancée's vehicle. The fact that defendant was engaged to the owner of the vehicle, who was also driving the vehicle at the time of the stop, did not endow him with an ownership interest in the vehicle. Defendant failed to demonstrate a legitimate property or possessory interest in the vehicle and, thus, lacked standing to object to the search of it. The trial court did not err by denying defendant's motion to suppress the seized evidence.

2. Under offense variable (OV) 4 of the sentencing guidelines, MCL 777.34, ten points must be assessed when serious psychological injury requiring professional treatment occurred to a victim. Evidence that the bank teller suffered from sleeplessness for weeks following the robbery, that she relived the events every time she closed her eyes, and that she continued to fear being robbed by her customers adequately supported the court's assessment of 10 points for OV 4.

3. Under OV 13 of the sentencing guidelines, MCL 777.43, ten points are properly assessed when the offense was part of a pattern of felonious criminal activity involving a combination of three or more crimes against a person or property or a violation of certain sections of the Public Health Code. In determining the appropriate number of points to assess under OV 13, all crimes within a five-year period must be counted regardless of whether the offenses resulted in a conviction. There was enough evidence for the trial court to properly assess 10 points for OV 13 even though defendant was not convicted of one of the crimes used to support the score in light of the unchallenged evidence presented at sentencing regarding that crime.

4. Const 1963, art 1, § 24(3) permits the Legislature to provide for an assessment against convicted defendants to pay for crime victims' rights. At the time defendant committed the offenses at issue, the court was authorized to order a person convicted of a felony to pay a $60 crime victim's assessment fee under MCL 780.905(1)(a), but the authorized fee was raised to $130 before defendant was sentenced by the enactment of 2010 PA 281. The ex post facto clauses of both the state and federal constitutions prohibit inflicting a greater punishment for a crime than that provided for when the crime was committed. While restitution is a form of punishment, the crime victim's assessment fee is not a form of restitution dependent on the injury suffered by the individual victim. Rather, the fee is an assessment for the benefit of all victims. Nor does the fee affect matters of substance. Accordingly, the fee increase did not increase defendant's punishment and, thus, did not violate ex post facto principles.

Affirmed.

CONSTITUTIONAL LAW — EX POST FACTO LAWS — GREATER PUNISHMENTS — CRIME VICTIM'S ASSESSMENT FEES — INCREASED FEES.

A statute violates ex post facto principles if it (1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence; formerly, a trial court was authorized to order a felon to pay a $60 crime victim's assessment fee under the Crime Victim's Rights Act (CVRA); effective December 16, 2010, the act was amended to increase the statutory assessment from $60 to $130; an assessment under the CVRA does not constitute punishment; thus, retroactive application of the fee increase does not violate the constitutional prohibition against ex post facto laws (US Const, art 1, § 10, cl 1; Const 1963, art 1, § 10, Const 1963, art 1, § 24[3]; MCL 780.905[1][a]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Louis F. Meizlish*, for the people.

State Appellate Defender (by *Christopher M. Smith*) for defendant.

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM. Defendant appeals as of right following his jury trial convictions for bank robbery, MCL 750.531, and two counts of possession of less than 25 grams of a controlled substance, MCL 333.7403(1) and MCL 333.7403(2)(a)(v). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 10 to 40 years for the robbery conviction and 2 to 15 years for each drug conviction. We affirm.

I. BASIC FACTS

Defendant was convicted of robbing a Southfield branch of Bank of America on March 18, 2010, while dressed as a woman. He was identified as the perpetrator by both the confronted bank teller and a bank manager, and a bystander identified defendant as the person the bystander had observed fleeing from the area. The prosecution also presented three witnesses who each testified that defendant had approached them about being a getaway driver for a planned bank robbery. When defendant was arrested on March 24, 2010, the police found crack cocaine and heroin on his person. At trial, defendant conceded that he was guilty of the narcotics offenses, but denied committing the bank robbery. He presented an alibi defense through his

fiancée, and the defense argued that the identification testimony was not credible, and that the witnesses who claimed that they were solicited to be a getaway driver were unreliable drug users.

II. MOTION TO SUPPRESS EVIDENCE

Defendant first argues that the trial court erred by denying his motion to suppress a pair of women's reading glasses that were seized during a search of defendant's fiancée's vehicle. Defendant had been a passenger in the vehicle when he was arrested. When reviewing a motion to suppress evidence, we review for clear error the trial court's findings of fact and we review de novo its ultimate decision whether to suppress the evidence. *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009).

The United States and the Michigan Constitutions both prohibit unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The basic rule is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v Gant*, 556 US 332, 338; 129 S Ct 1710; 173 L Ed 2d 485 (2009) (citation and quotation marks omitted). In other words, warrantless searches and seizures are presumptively unreasonable unless an exception to the warrant requirement applies. However, to attack the propriety of a search and seizure, the defendant must first establish that he or she has standing to challenge the search. *People v Powell*, 235 Mich App 557, 561; 599 NW2d 499 (1999). Standing exists if, considering the totality of the circumstances, the defendant had a legitimate expectation of privacy in the object of the search and seizure and that expecta-

tion is one that society is prepared to recognize as reasonable. *People v Parker*, 230 Mich App 337, 340; 584 NW2d 336 (1998). Regarding vehicles, when the stop of a vehicle is legal, a passenger with no property or possessory interest in the vehicle does not have standing to contest the search of the vehicle.[1] See *People v Labelle*, 478 Mich 891, 892 (2007), *People v Armendarez*, 188 Mich App 61, 71; 468 NW2d 893 (1991), *People v Carey*, 110 Mich App 187, 194-195; 312 NW2d 205 (1981), and *People v Smith*, 106 Mich App 203, 208-209; 307 NW2d 441 (1981).

In this case, defendant did not assert a property or possessory interest in the vehicle or the women's eyeglasses that were seized. The vehicle searched belonged to defendant's fiancée, who was also the driver. The mere fact that defendant was engaged to the owner of the vehicle did not endow him with an ownership interest in the vehicle or a reasonable expectation of privacy in it. Although defendant claims that his fiancée allowed him to use the vehicle, he did not show a continuous use of and right of access to the vehicle. Thus, defendant failed to carry his burden of demonstrating that he had a legitimate possessory or privacy interest in the vehicle. Accordingly, he lacks standing to contest the search of it and the seizure of the women's eyeglasses from it. Therefore, the trial court did not err by denying defendant's motion to suppress.

III. THE SCORING OF OFFENSE VARIABLES 4 AND 13

Defendant argues that he is entitled to resentencing because the trial court erroneously assessed 10 points for offense variables (OVs) 4 and 13 of the sentencing

[1] Defendant does not dispute the legality of the police stop of his fiancée's vehicle.

guidelines. Again, we disagree. Defendant did not object to the scoring of OV 4 or OV 13 at sentencing. However, he filed a motion to remand with this Court in order to raise this issue in a motion for resentencing. Therefore, this issue is preserved. MCR 6.429(C) and MCL 769.34(10).[2]

A trial court's scoring of the sentencing guidelines is reviewed to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Lechleitner*, 291 Mich App 56, 62; 804 NW2d 345 (2010). When challenged, a sentencing factor need only be proved by a preponderance of the evidence. *People v Wiggins*, 289 Mich App 126, 128; 795 NW2d 232 (2010). The trial court may rely on reasonable inferences arising from the record evidence to sustain the scoring of an offense variable. *People v Haacke*, 217 Mich App 434, 436; 553 NW2d 15 (1996).

A. OFFENSE VARIABLE 4

Ten points must be scored for OV 4 when "[s]erious psychological injury requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(a). "[T]he victim's expression of fearfulness is enough to satisfy the statute[.]" *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009); see also *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). In this case, the confronted bank teller testified at trial that she was nervous and scared during the robbery. She was concerned that defendant would harm her because there were no protective barriers between her and defendant and she did not know if he was going

[2] We denied the motion to remand for "failure to persuade the Court of the necessity of a remand at this time." *People v Earl*, unpublished order of the Court of Appeals, entered February 21, 2012 (Docket No. 302945).

to "jump the window" or if he had a gun. According to a victim impact statement prepared for sentencing, the teller suffered from sleeplessness for weeks as a result of defendant's actions, "relived" the events of the robbery every time she closed her eyes, and now fears being robbed by her bank customers. The teller also submitted a letter to the court in which she recounted her constant fear of being robbed by her customers and her sleepless nights as a result of defendant's actions. This evidence adequately supports the trial court's assessment of 10 points for OV 4.

B. OFFENSE VARIABLE 13

OV 13 considers the "continuing pattern of criminal behavior." MCL 777.43. A score of 10 points is appropriate when "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of [MCL 333.7401(2)(a)(*i*) to (*iii*) or MCL 333.7403(2)(a)(*i*) to (*iii*)] of the public health code[.]" MCL 777.43(1)(d). Defendant argues that the trial court improperly considered a 2008 charge of bank robbery, which was dismissed, as the third offense to support the 10-point score for OV 13.

In determining the appropriate points for OV 13, "all crimes within a 5-year period . . . shall be counted *regardless of whether the offense resulted in a conviction*." MCL 777.43(2)(a) (emphasis added). In this case, the presentence report indicates that, in the 2008 case, defendant was identified as the perpetrator by his parole agent and was arrested. At sentencing, the prosecutor presented the surveillance photographs from the 2008 robbery, which occurred at the same bank involved in this case. Although the 2008 case was dismissed in the district court, there was no indication

at sentencing that the 2008 allegation was dismissed for want of probable cause. In light of the unchallenged evidence presented at sentencing regarding the 2008 bank robbery, there was enough evidence for the trial court to assess 10 points for OV 13.

IV. CRIME VICTIM'S ASSESSMENT FEE

Finally, defendant argues that that imposition of an enhanced $130 crime victim's assessment fee violates the bar on ex post facto laws under the federal and state constitutions because the crimes were committed before the Legislature increased the fee from $60 to $130. We disagree. Because defendant failed to raise this issue below, it is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

The ex post facto clauses of both the state and federal constitutions prohibit inflicting a greater punishment for a crime than that provided for when the crime was committed. *People v Callon*, 256 Mich App 312, 316-317; 662 NW2d 501 (2003). A statute violates ex post facto principles if it " '(1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence.' " *People v McRunels*, 237 Mich App 168, 175; 603 NW2d 95 (1999), quoting *Riley v Parole Bd*, 216 Mich App 242, 244; 548 NW2d 686 (1996) (emphasis omitted). At issue here is whether the fee increase from $60 to $130 increased defendant's punishment. We find that it did not.

Const 1963, art 1, § 24(3) states that "[t]he legislature may provide for an assessment against convicted defendants to pay for crime victims' rights." At the time defendant committed the instant offenses, a trial court

was authorized to order a person convicted of a felony to pay a $60 crime victim's assessment fee under the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*. MCL 780.905(1)(a) as amended 2005 PA 315. The statute was subsequently amended by 2010 PA 281 to increase the statutory assessment to $130. The amendatory act was given immediate effect on December 16, 2010.

Defendant cites *People v Slocum*, 213 Mich App 239; 539 NW2d 572 (1995), in support of his position that the increase in the assessment resulted in a disadvantage to him by increasing his punishment. At issue in *Slocum* was whether the trial court was authorized to require a criminal defendant to pay the cost of his extradition from Florida. Extradition costs had previously been the obligation of the county in which the crime was committed; however, before the defendant's sentencing, MCL 780.766 was amended to entitle governmental entities to restitution from criminal defendants. *Id*. at 242-243. The prosecutor argued that the statute was merely procedural in nature and, therefore, could be applied retroactively and that it gave the court the authority to order the defendant to pay the extradition costs. *Id*. This Court disagreed. "[I]t is clear that the amendment would make the statute apply to defendant's extradition, and that action occurred before the amendment of the statute." *Id*. at 243. Because "restitution is a form of punishment" the amendment of MCL 780.766, "by increasing the amount of restitution for which defendant would be responsible, would increase his punishment" and, therefore, application of the statute "would be in violation of the Ex Post Facto Clause." *Id*. at 244.

However, in *People v Matthews*, 202 Mich App 175; 508 NW2d 173 (1993), we directly addressed the valid-

ity of assessments made pursuant to MCL 780.905. We rejected the defendant's argument that the assessment was an unauthorized tax given that Const 1963, art 1, § 24 specifically provides for such an assessment. *Id*. at 176. We held that "the Legislature's decision to assess convicted felons the same amount to fund the services is not arbitrary or irrational, considering services provided to victims of felonies are provided without regard to the seriousness of the offense." *Id*. We also rejected the defendant's claims that the statute violated constitutional guarantees of due process and equal protection. Importantly, we noted:

> [T]he assessment is *not intended to be a form of restitution* dependent upon the injury suffered by any individual victim. Instead, the Legislature, pursuant to the authority granted it under Const 1963, art 1, § 24(2) and (3), has provided for the assessment against certain defendants for the benefit of all victims. [*Id*. at 177 (emphasis added).]

Thus, while it is true that restitution is a form of punishment such that any newly authorized form of restitution may amount to an increase in the defendant's punishment, an assessment under the CVRA is neither restitution nor punishment. Moreover, "the Ex Post Facto Clause does not apply to legislative control of remedies and modes of procedure that do not affect matters of substance." *Slocum*, 213 Mich App at 243, citing *People v Davis*, 181 Mich App 354, 358; 448 NW2d 842 (1989). As our Supreme Court has recently noted:

> Generally, " 'statutes are presumed to operate prospectively unless the contrary intent is clearly manifested.' " However, statutes that "operate in furtherance of a remedy or mode of procedure" and that "neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively" absent a contrary legislative intent. [*People v Kolanek*, 491 Mich 382, 405; 817 NW2d 528 (citations omitted).

As clearly enunciated in *Matthews*, an assessment under the CVRA is *not*, in fact, restitution.[3] It is not punitive in nature nor does it affect matters of substance. Our Constitution has specifically authorized the Legislature to provide for an assessment against convicted defendants for the benefit of victims of crime. Accordingly, the trial court's order that defendant pay $130 under the CVRA is not a violation of the ex post facto constitutional clauses.

Affirmed.

K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ., concurred.

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[3] Thus, to the extent that prior panels of this Court treated assessments under the CVRA as restitution or punishment, those opinions are in conflict with this Court's published authority on the issue. See *People v Barnes*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 288711); *People v Crocker*, unpublished memorandum opinion of the Court of Appeals, issued January 13, 1998 (Docket No. 201100). Unpublished opinions have no precedential value in any event. MCR 7.215(C)(1).

SALLIE v FIFTH THIRD BANK

Docket No. 302554. Submitted June 13, 2012, at Grand Rapids. Decided June 19, 2012, at 9:15 a.m. Leave to appeal denied, 493 Mich 871.

Clyde Sallie filed an action in the Kent Circuit Court against Fifth Third Bank and Foreclosure Management Company, challenging Fifth Third's attempt to foreclose on a mortgage Sallie defaulted on in September 2009. Sallie and his now-deceased wife had borrowed money from Old Kent Bank in 2000 and granted the bank a mortgage on their home as security. Old Kent Bank merged with Fifth Third in 2001. Following Sallie's default on the mortgage in 2009, Fifth Third sought to foreclose on Sallie's property by advertisement in accordance with the power-of-sale clause contained in the mortgage. Fifth Third was unable to locate the promissory note signed by Sallie and his wife as part of the mortgage loan transaction at the time it commenced foreclosure proceedings. Sallie argued that Fifth Third could not foreclose on the mortgage without producing the note. The court, Christopher P. Yates, J., granted summary disposition in favor of Fifth Third, concluding that the bank could pursue all remedies available under the mortgage regardless of whether the promissory note was produced. Sallie appealed.

The Court of Appeals *held*:

The circuit court properly granted summary disposition for Fifth Third. MCL 600.3201 provides that upon default, a mortgage may be foreclosed by advertisement if there is a power-of-sale clause. Under MCL 600.3204(1), a party may foreclose a mortgage by advertisement if (1) a default in a condition of the mortgage occurs by which the power to sell became operative, (2) an action to recover the debt secured by the mortgage has not been instituted, or, if instituted, has been discontinued (3) the mortgage containing the power-of-sale clause had been recorded, and (4) the party foreclosing the mortgage owns either the indebtedness or an interest in the indebtedness. A mortgagee may foreclose on a mortgage without producing the note secured by the mortgage if the mortgage produces a valid mortgage and power of sale. The mortgagee must give clear proof of the debtor's default and continuing debt obligation. The circuit court properly granted

summary disposition in favor of Fifth Third because the valid, recorded mortgage contained a power-of-sale clause, Sallie had defaulted on the mortgage, and the bank established Sallie's underlying debt and default with clear proof. Fifth Third also established that it owned Sallie's debt by providing unrefuted testimony that the lost note was never transferred, assigned, or sold, and Fifth Third had not instituted an action to recover the debt secured by note. Accordingly, Fifth Third was entitled to foreclose on the mortgage notwithstanding the loss of the promissory note.

Affirmed.

MORTGAGES — FORECLOSURES — POWER OF SALE — LOSS OF PROMISSORY NOTE.

Following default, a mortgage may be foreclosed by advertisement if the document contains a power-of-sale clause; under MCL 600.3204(1) a party may foreclose a mortgage by advertisement if (1) a default in a condition of a mortgage occurs by which the power to sell becomes operative, (2) an action to recover the debt secured by the mortgage has not been instituted, (3) the mortgage containing the power-of-sale clause had been recorded, and (4) the party foreclosing the mortgage either owns the indebtedness or has an interest in the indebtedness; a mortgagee may foreclose on a mortgage without producing the note secured by the mortgage if the mortgagee produces a valid mortgage and power of sale; the mortgagee must give clear proof of the debtor's default and continuing debt obligation. [MCL 600.3201; MCL 3204(1).]

Bernard C. Schaefer for Clyde Sallie.

Dykema Gossett PLLC (by *Mark D. van der Laan*) for Fifth Third Bank.

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM. Plaintiff appeals as of right the circuit court's order granting summary disposition in favor of defendant Fifth Third Bank in this mortgage foreclosure dispute. Because defendant was able to pursue foreclosure as a remedy for plaintiff's default on the mortgage notwithstanding its loss of the underlying promissory note, we affirm.

In August 2000, plaintiff and his now-deceased wife borrowed $63,665.32 from Old Kent Bank and granted the bank a mortgage on their home as security for the loan. In 2001, Old Kent Bank merged with defendant, and, in 2003, plaintiff's wife died. Plaintiff defaulted on the loan in September 2009, and defendant, pursuant to the power-of-sale clause contained in the mortgage, sought to foreclose on plaintiff's property by advertisement. Although plaintiff and his wife had signed a promissory note as part of the mortgage loan transaction, defendant was unable to locate the note at the time that it commenced foreclosure proceedings. Plaintiff challenged the foreclosure proceedings on the basis that defendant was unable to foreclose on the mortgage without producing the note.[1] The trial court granted summary disposition for defendant, determining that regardless of the note, upon plaintiff's default defendant was able to pursue the remedies available under the mortgage, which included foreclosure.

Plaintiff argues that defendant was not entitled to foreclose on the mortgage without showing that it acquired and had possession of the promissory note, in addition to the mortgage, after Fifth Third merged with Old Kent Bank. The trial court's decision granting summary disposition for defendant on this issue was premised on MCR 2.116(C)(10). We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In reviewing a motion for summary disposition under subrule (C)(10), we consider "the pleadings, admissions, and other evidence submit-

[1] Plaintiff initially denied borrowing $63,665.32 and executing the mortgage, claiming that his signature had been forged. Thereafter, he abandoned that argument and focused on defendant's inability to produce the note.

ted by the parties in the light most favorable to the nonmoving party." *Id.* "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* We also review de novo issues involving the interpretation of statutes. *Ford Motor Co v Dep't of Treasury*, 288 Mich App 491, 494; 794 NW2d 357 (2010).

A mortgagee may foreclose on a mortgage without producing the note secured by the mortgage. *Snyder v Hemmingway*, 47 Mich 549, 553; 11 NW 381 (1882). In order to do so, however, the mortgagee must produce a valid mortgage and power of sale. *Id.* "[I]t is only under the power of sale that any steps can be taken." *Id.* The mortgagee must also give "clear proof" of the debtor's default and continuing debt obligation to the mortgagee. *Hungerford v Smith*, 34 Mich 300, 301 (1876); see also *George v Ludlow*, 66 Mich 176, 179; 33 NW 169 (1887); *Young v McKee*, 13 Mich 552, 556 (1865). This century-old case law is consistent with our current statutory law, which provides that "[e]very mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner specified in this chapter." MCL 600.3201. Pursuant to MCL 600.3204(1),

> a party may foreclose a mortgage by advertisement if all of the following circumstances exist:
>
> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.

> (c) The mortgage containing the power of sale has been properly recorded.
>
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

Notably, the statute does not require that the mortgagee produce the underlying note in order to foreclose a mortgage by advertisement.

In the case at bar, defendant met all the requirements to foreclose by advertisement. Defendant produced a valid, recorded mortgage that contained a power-of-sale clause. The mortgage explicitly stated: "Warning. This Mortgage contains a power of sale, and, upon default, may be foreclosed by advertisement." In addition, a "default in a condition of the mortgage" occurred, and defendant established plaintiff's underlying debt and default with "clear proof." See MCL 600.3204(1)(a); *Hungerford*, 34 Mich at 301. Defendant produced documentary evidence and presented testimony establishing plaintiff's payment history, his default, and the amount outstanding on the debt. In fact, plaintiff admitted that he had stopped making payments on the debt.

Defendant also established that it owned plaintiff's debt. Defendant provided unrefuted testimony that the lost note was never transferred, assigned, or sold. By establishing its continuing ownership of plaintiff's debt, defendant eliminated the risk that plaintiff would face multiple collections on the same debt. See *George*, 66 Mich at 179. Moreover, defendant did not institute an action to recover the debt secured by the note as described in MCL 600.3204(1)(b). Accordingly, defendant is entitled to foreclose on the mortgage notwith-

standing the loss of the note, and the trial court properly granted summary disposition for defendant.[2]

Affirmed.

DONOFRIO, P.J., and MARKEY and OWENS, JJ., concurred.

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[2] The parties' reliance on MCL 440.3309 is misplaced because that provision pertains to the enforcement of an instrument that was lost. Because defendant is proceeding on the mortgage rather than the note, MCL 440.3309 is inapplicable.

PEOPLE v BALL

Docket No. 303727. Submitted April 11, 2012, at Lansing. Decided June 19, 2012, at 9:20 a.m. Leave to appeal denied, 493 Mich 878.

Amanda Sue Ball pleaded guilty of manslaughter, MCL 750.321, and unlawful delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), in the Jackson Circuit Court. Defendant had delivered a half of gram of heroin to the victim in exchange for a PlayStation video game, following which the victim died from a heroin overdose. The court, John G. McBain, J., sentenced her to concurrent terms of 71 months to 15 years in prison for the manslaughter conviction and 57 months to 20 years in prison for the delivery conviction. When it scored the sentencing guidelines, the court assessed 20 points for offense variable 1 after concluding that defendant had subjected the victim to a harmful substance. Defendant appealed by leave granted.

The Court of Appeals *held*:

Offense variable 1 (OV 1), MCL 777.31, considers aggravated use of a weapon. MCL 777.31(1)(b) requires that 20 points be assessed when the victim was subjected or exposed to a harmful biological substance or device, a harmful chemical substance or device, a harmful radioactive material or device, an incendiary device, or an explosive device. A weapon is an instrument or device used for attack or defense in a fight or anything used against an opponent, adversary, or victim. A substance must be used as a weapon in order for points to be assessed under OV 1. The circuit court erred by assessing 20 points for OV 1 because there was no evidence that defendant used the heroin as a weapon when she traded it to the victim for a video game. Although heroin can be used as a weapon and be lethal in certain doses, defendant did not attack the victim with the heroin or force her to use it; the transaction was an ordinary sale of heroin.

Reversed and remanded for resentencing.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 1 — DEFINITION OF WEAPON.

Offense variable 1 (OV 1) considers the aggravated use of a weapon; 20 points must be assessed under OV 1 when a victim was

> subjected or exposed to a harmful biological substance or device, a harmful chemical substance or device, a harmful radioactive material or device, an incendiary device, or an explosive device; a weapon is an instrument or device used for attack or defense in a fight or anything used against an opponent, adversary, or victim; a substance must be used as a weapon in order for points to be assessed under OV 1 (MCL 777.31[1][b]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Henry Zavislak*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

Ronald D. Ambrose for defendant.

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

SAWYER, J. We are asked to determine whether the delivery of heroin in a drug transaction constitutes the aggravated use of a weapon under offense variable (OV) 1 of the sentencing guidelines. We conclude that while heroin could, under the appropriate fact situation, constitute the aggravated use of a weapon, that it is not the case in an ordinary drug transaction. That is, for points to be assessed under OV 1, the heroin itself must have been used as a weapon.

Defendant delivered a half gram of heroin to the victim in exchange for a PlayStation video game. Thereafter, the victim overdosed on the heroin. Defendant pleaded guilty of manslaughter[1] and unlawful delivery of less than 50 grams of heroin.[2] She was sentenced to 71 months to 15 years in prison on the manslaughter conviction and 57 months to 20 years in prison on the delivery conviction, with the sentences to run concurrently. She appeals by leave granted.

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[1] MCL 750.321.

[2] MCL 333.7401(2)(a)(*iv*).

At sentencing, the prosecutor requested that 20 points be assessed for OV 1, arguing that defendant subjected the victim to a harmful substance, namely the heroin. Defendant objected to the scoring, but the trial court agreed that heroin met the definition of "chemical substance" under OV 1 and assessed the 20 points.

In resolving this question, we apply the following principles of statutory construction from *People v Blunt*:[3]

> When construing a statute, this Court must ascertain and give effect to the Legislature's intent. *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). "The first step in that determination is to review the language of the statute itself." *Id*. (quotation marks and citation omitted). We construe statutory language according to the common and approved meaning of the words, but when a statute employs technical terms of art, " 'it [is] proper to explain them by reference to the art or science to which they [are] appropriate.' " *West Bloomfield Charter Twp v Karchon*, 209 Mich App 43, 51; 530 NW2d 99 (1995), quoting *Corning Glass Works v Brennan*, 417 US 188, 201; 94 S Ct 2223; 41 L Ed 2d 1 (1974). In discerning legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006). The Court must avoid construing a statute in a manner that renders statutory language nugatory or surplusage. *Id*. " 'We construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature.' " *Id*., quoting *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159-160; 627 NW2d 247 (2001). When discerning legislative intent, a particular word in one statutory section must be interpreted in conjunction with every other section, "so as to produce, if possible, a harmonious and consistent enactment as a whole." *Grand Rapids v Crocker*, 219 Mich 178, 183; 189 NW 221 (1922); see also *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416 420; 662 NW2d 710 (2003) (invoking as a statutory interpreta-

[3] *People v Blunt*, 282 Mich App 81, 83-84; 761 NW2d 427 (2009).

> tion aid the doctrine of *noscitur a sociis*, "i.e., that a word or phrase is given meaning by its context or setting") (quotation marks and citation omitted).

Under MCL 777.31(1) 20 points are assessed for OV 1 as follows:

> Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (b) The victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device.

Furthermore, MCL 750.200h(i) defines "harmful chemical substance" as "a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants."

We disagree with defendant's argument that heroin does not constitute a harmful chemical substance because there are nonlethal dose levels. As this case demonstrates, it is capable of causing death and is therefore, a harmful chemical substance. Nothing in MCL 750.200h(i) restricts the definition of "harmful chemical substances" to those substances that are lethal at all dose levels.[4] We do,

[4] Indeed, while we are not chemists, we question whether there is any substance that is lethal at the smallest possible dose level. But even if there is a substance that will kill with exposure to only one molecule of it, it seems doubtful that the Legislature intended to limit the provisions to those substances.

however, agree with defendant that it was not, under the facts of this case, used as a weapon.

The first sentence of MCL 777.31 directs that OV 1 applies to the aggravated use of a weapon. The statute does not define "weapon." But *Random House Webster's College Dictionary* (2001) defines it as "1. any instrument or device used for attack or defense in a fight or in combat. 2. anything used against an opponent, adversary, or victim . . . . 3. any part or organ serving for attack or defense, as claws, horns, teeth, or stings." Furthermore, the need for the substance to be used as a weapon is supported by the Supreme Court's statement in *People v Carr*,[5] wherein the Court ordered resentencing because the "trial court committed plain legal error in scoring offense variable 1 because the defendant did not use the methadone against her child as a weapon, as is required to score the variable." The prosecution attempts to distinguish *Carr* by pointing out that the underlying facts are unknown, but that it did involve methadone, which has legal uses, while the case at bar involves heroin, which has no legal uses. But such a distinction does not mean that heroin is always used as a weapon merely because it is illegal per se. While the underlying facts of *Carr* may be unknown, it is clear that the Supreme Court stated that a substance must be used "as a weapon" in order to score the variable.

Undoubtedly, heroin can be used as a weapon. For example, one could forcibly inject heroin into an unwilling victim for the purpose of killing that person by means of a heroin overdose. In such a case, we would have no difficulty in concluding that the heroin was used as a weapon because it was "used against an opponent, adversary, or victim."

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[5] *People v Carr*, 489 Mich 855, 856 (2011).

But that is not what happened here. There is no evidence that defendant forced the victim to ingest the heroin against his will. This was an ordinary, albeit illegal, consensual drug transaction. Defendant traded the heroin to the victim for something of value, and thereafter the victim voluntarily ingested the heroin with tragic results. But defendant did not attack the victim with the heroin and, the heroin was not used as a weapon. Therefore, it is not appropriate to score OV 1 as if it had been. Accordingly, the trial court must resentence defendant under properly scored sentencing guidelines, assessing zero points for OV 1.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

HOEKSTRA, P.J., and SAAD, J., concurred with SAWYER, J.

WARDELL v HINCKA

Docket No. 308243. Submitted June 12, 2012, at Lansing. Decided June 21, 2012, at 9:00 a.m.

Defendant, Joshua Thomas Hincka, petitioned the Presque Isle Circuit Court to modify the October 29, 2010, parenting-time order entered following his divorce from plaintiff, Kristine Lee Wardell. The existing parenting-time order gave the parties joint legal and physical custody of their daughter, specified a week-on, week-off parenting-time schedule, and specified where she would attend school. Hincka moved for a change of custody on the basis that he had moved to Cheboygan, which increased the length of the child's commute to school on the weeks she was with him, and that Wardell's husband had a criminal record. Wardell also moved for a change of custody, and the Friend of the Court recommended that primary physical custody be granted to Wardell, with the parties retaining joint legal custody. After a trial, the court, Donald J. McLennan, J., denied the respective motions to change custody, finding that the best-interest factors of MCL 722.23 weighed equally in favor of the parties and that the only change in circumstances was Hincka's move to Cheboygan. Hincka appealed.

The Court of Appeals *held*:

1. The Court of Appeals has jurisdiction of an appeal of right from a final judgment or final order of the circuit court under MCR 7.203(A)(1). Under MCR 7.202(6)(a)(iii), in a domestic relations action a final order includes a postjudgment order affecting the custody of a minor. Orders denying a motion for a change of custody have been treated in practice as appealable by right. An order regarding the custody of a minor has an effect on and influences where the child will live. Under MCR 7.202(6)(a)(iii), final orders include those domestic relations postjudgment orders that affect the custody of the minor, not just those that result in a custody change. Contrary to Wardell's argument, Hincka's appeal of the trial court's order denying his motion to change custody was appealable by right and the Court of Appeals had jurisdiction over the case. MCR 7.202(6)(a)(iii) includes orders wherein a motion to change custody has been denied.

2. Three standards of review apply to child custody cases. The great-weight-of-the-evidence standard applies to all findings of fact, and the trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. An abuse-of-discretion standard applies to the trial court's discretionary rulings such as custody decisions. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. Under MCL 722.27(1)(c), when an established custodial environment exists, a change in custody may only be made upon a showing of clear and convincing evidence that the change is in the child's best interests as set forth in MCL 722.23. The trial court's findings were not against the great weight of the evidence. Of those factors that the Court deemed relevant, only MCL 722.23(b) weighed slightly in Wardell's rather than Hincka's favor. The only substantive changed circumstance was Hincka's move to Cheboygan, which increased the child's commute to school when she was in his custody. The trial court did not abuse its discretion when it concluded that a reduction in commute time did not clearly and convincingly outweigh the benefits of a stable, successful, and unchanging joint-custody relationship.

Affirmed.

PARENT AND CHILD — PARENTING TIME — CHANGES OF PARENTING TIME — APPEALS — JURISDICTION.

The Court of Appeals has jurisdiction of an appeal of right from a final judgment or final order of the circuit court; in a domestic-relations action, a final order includes a postjudgment order affecting the custody of a minor; orders denying a motion for a change of custody include those domestic-relations postjudgment orders that affect the custody of the minor, not just those that result in a custody change; a circuit court's order denying a motion to change custody is appealable by right to the Court of Appeals because it affects the custody of a minor (MCR 7.203[A][1], MCR 7.202[6][a][iii]).

Denise M. Burke for Kristine Lee Wardell.

Patrick, Kwiatkowski & Hesselink, PLLC (by *Joseph P. Kwiatkowski*), for Joshua T. Hincka.

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM. Defendant, Joshua Thomas Hincka, appeals by right an order denying his motion for a change of custody. We affirm.

I. FACTS

Defendant and plaintiff, Kristine Lee Wardell, were married on December 31, 2007, and divorced on January 5, 2010. Their consent judgment provided for joint legal and physical custody of their daughter, who was born on July 11, 2006. On October 29, 2010, the trial court entered the parties' most recent parenting order, which gave both parties joint legal and physical custody, specified a week-on, week-off parenting-time schedule, and specified that the child would attend school in Posen, Michigan, which was between plaintiff's home in Alpena and defendant's home in Rogers City.

In April 2011, defendant moved to Cheboygan. He filed a motion for a change of custody, citing a change in circumstances brought about by his move and his discovery that plaintiff's husband had a criminal record. The trial court found sufficient evidence of a change in circumstances and referred the case to the Friend of the Court. Plaintiff filed a countermotion for a change of custody. The Friend of the Court recommended that primary physical custody be granted to plaintiff, with plaintiff and defendant having joint legal custody.

The trial court then conducted a trial. Defendant testified that he had part-time employment and was engaged to and living with Melody Rocco. He testified that he, Rocco, and Rocco's two daughters lived in a three-bedroom home. He further testified that the child had a wonderful relationship with Rocco's youngest daughter, who was the same age. He claimed that he had an excellent and affectionate relationship with the

child, that the two engaged in various activities together, and that he was very engaged in her education. Defendant further testified that plaintiff would not answer the phone, return his calls, or permit him to speak with the child when the child was in plaintiff's custody.

Plaintiff testified that both she and defendant had an excellent relationship with the child. She testified that the child typically had her own room but did not always choose to sleep there. She acknowledged that even though her husband's driver's license had been revoked in 2006 he had driven the child around in the past, but claimed that they had discontinued the practice. She denied drinking around the child and testified that she was currently attending school full-time. She was concerned that defendant would prevent her from seeing the child if he were awarded custody.

On December 30, 2011, the trial court issued an opinion and order denying the parties' respective motions to change custody. It noted that the current custody arrangement appeared to be working, found that the best-interest factors weighed equally in favor of the parties, and found that the only change in circumstances was defendant's move to Cheboygan. While the trial court acknowledged that a 70-minute commute was not ideal, it concluded that it was not "so burdensome to the child as to justify disruption of the most recent parenting time order," which "gives [the child] maximum exposure to both parents" and "allows bonding with siblings as well as her soon-to-be stepsiblings."

II. JURISDICTION

Plaintiff contends that this Court should dismiss defendant's claim of appeal for lack of jurisdiction

because the trial court's December 30, 2011, opinion and order is not a final order under MCR 7.202(6)(a). We disagree.

Whether this Court has jurisdiction to hear an appeal is an issue that we review de novo. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 132-133; 624 NW2d 197 (2000). MCR 7.203(A)(1) provides that this Court has jurisdiction of an appeal of right from "[a] final judgment or final order of the circuit court . . . as defined in MCR 7.202(6) . . . ." Under MCR 7.202(6)(a)(iii), a "final order" includes, "in a domestic relations action, a postjudgment order affecting the custody of a minor." Resolution of this jurisdictional question, therefore, turns on whether the trial court's December 30, 2011, postjudgment order was an order "affecting the custody of a minor." See MCR 7.202(6)(a)(iii).

Although not addressing the issue in the context of a jurisdictional challenge, this Court has stated that a trial court's order denying a petition for a change of custody is "an order affecting custody." *Rivette v Rose-Molina*, 278 Mich App 327, 328, 333; 750 NW2d 603 (2008). Indeed, this Court has in practice treated orders denying a motion for a change of custody as appealable by right. See, e.g., *Corporan v Henton*, 282 Mich App 599, 600-603; 766 NW2d 903 (2009); *Treutle v Treutle*, 197 Mich App 690, 691-692; 495 NW2d 836 (1992); *Schubring v Schubring*, 190 Mich App 468, 469-470; 476 NW2d 434 (1991); *Sedlar v Sedlar*, 165 Mich App 71, 72-74; 419 NW2d 18 (1987).

Furthermore, applying the principles of court-rule interpretation to MCR 7.202(6)(a)(iii), we conclude that the trial court's December 30, 2011, postjudgment order is an order "affecting the custody of a minor." "Interpretation of a court rule is subject to the same basic principles which govern statutory interpretation."

St George Greek Orthodox Church of Southgate, Mich v Laupmanis Assoc, PC, 204 Mich App 278, 282; 514 NW2d 516 (1994). "The mission of a court engaged in statutory construction is to interpret and apply the statute in accordance with the intent of the drafter, which, in the first instance, must be determined from the plain meaning of the language used." *Mahrle v Danke*, 216 Mich App 343, 348; 549 NW2d 56 (1996). To ascertain the plain meaning of a term that is not defined by statute or court rule, as is the case here given that the court rules do not define "affecting," this Court may consult a dictionary to determine the plain meaning of the term. *Id.* at 348-349; *Vodvarka v Grasmeyer*, 259 Mich App 499, 510; 675 NW2d 847 (2003). When consulting a dictionary, this Court should be cognizant of the context in which the term is used. *Vodvarka*, 259 Mich App at 510.

Black's Law Dictionary defines "affect" as "[m]ost generally, to produce an effect on; to influence in some way." Black's Law Dictionary (9th ed), p 65. In a custody dispute, one could argue, as plaintiff does, that if the trial court's order does not change custody, it does not produce an effect on custody and therefore is not appealable of right. However, one could also argue that when making determinations regarding the custody of a minor, a trial court's ruling necessarily has an effect on and influences where the child will live and, therefore, is one affecting the custody of a minor. Furthermore, the context in which the term is used supports the latter interpretation. MCR 7.202(6)(a)(iii) carves out as a final order among postjudgment orders in domestic relations actions those that affect the custody of a minor, not those that "change" the custody of a minor. As this Court's long history of treating orders denying motions to change custody as orders appealable by right demonstrates, a decision regarding the custody of a

minor is of the utmost importance regardless of whether the decision changes the custody situation or keeps it as is. We interpret MCR 7.202(6)(a)(iii) as including orders wherein a motion to change custody has been denied.

Accordingly, this Court has jurisdiction over this appeal under MCR 7.203(A)(1) because the trial court's December 30, 2011, opinion and order is a final order under MCR 7.202(6)(a)(iii).[1]

III. CHANGE OF CUSTODY

Defendant argues that the trial court abused its discretion by denying his motion for a change of custody because it ignored the great weight of the evidence at trial regarding the best-interest factors, which defendant argues was overwhelmingly in his favor. We do not agree.

Three standards of review apply to child custody cases. *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). The great-weight-of-the-evidence standard applies to all findings of fact; under this standard, "the trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction." *Id*. "An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions." *Id*. Finally, "[a] trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Id*. (citation and quotation marks omitted).

When an established custodial environment exists, a change in custody may be made only upon a showing by

[1] Even if we were to conclude that the trial court's December 30, 2011, opinion and order is not a final order appealable by right, we would still, in the interest of judicial economy, exercise our discretion to treat defendant's claim of appeal as an application for leave to appeal, grant leave, and address the change-of-custody issue presented. See *In re Investigative Subpoena*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003).

clear and convincing evidence that the change is in the child's best interests. MCL 722.27(1)(c). The child's best interests are evaluated under factors set forth in MCL 722.23:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
>
> (*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

In the instant case, the trial court evaluated the above factors and concluded that factors (h), (i), (k), and (*l*) were not relevant to the dispute; that factors (a), (c), (d), (e), (f), (g), and (j) were equal between plaintiff and defendant; and that factor (b) might weigh slightly in favor of plaintiff rather than defendant. Given these determinations and the fact that the only real changed circumstance since the institution of the prior custody arrangement was defendant's move to Cheboygan, the trial court concluded that no change in custody was warranted.

Contrary to defendant's assertions, the findings of the trial court do not contradict the great weight of the evidence. Both parties submitted testimony regarding their love of the child, the child's affection toward them, and the suitability of their respective homes. Each party also raised valid criticisms of the other party but acknowledged that the other party loved the child and that the child appeared to be thriving.[2] Most importantly, the record shows that the only substantive changed circumstance before the initiation of the instant dispute was defendant's move to Cheboygan, which increased the child's commute time to school

[2] Defendant focuses heavily on plaintiff's moral fitness, including her false statement about whether she had consumed alcohol in the prior couple of years and allowing her husband to drive without a license. The trial court found that "neither party has particularly impressed the Court with sound judgment." As the trial court correctly noted, factor (f) evaluates the parties' relative moral fitness only as it relates to how they will function as parents rather than with respect to who is the morally superior adult. *Fletcher v Fletcher*, 447 Mich 871, 887; 526 NW2d 889 (1994). The trial court noted that "[d]uring the period this Court has had jurisdiction over this case, both parties have exhibited moral flaws, but there has never been any showing that either parent currently abuses alcohol or drugs, nor abuses or neglects this child." The trial court's finding that factor (f) was equal between the parties was not against the great weight of the evidence.

from about 20 minutes to roughly 70 minutes. While the child might benefit from a reduced commute time during the weeks she is in defendant's custody, the increased commute time did not affect her performance at school given that plaintiff and defendant testified that she was doing "really good" and "great" in school. Moreover, the testimony at trial established that when the child is with defendant, she wakes up at 6:00 a.m. to go to school and goes to sleep at 8:00 p.m.; these are not abnormal hours for a child. Accordingly, the trial court did not abuse its discretion when it concluded that a 50-minute reduction in commute time does not clearly and convincingly outweigh the benefits of a stable, successful, and unchanging joint-custody relationship.

Affirmed.

BECKERING, P.J., and FITZGERALD and STEPHENS, JJ., concurred.

PEOPLE v YANNA

PEOPLE v COLLIE

Docket Nos. 304293 and 306144. Submitted March 14, 2012, at Lansing. Decided June 26, 2012, at 9:00 a.m.

Dean Scott Yanna was charged in the Bay Circuit Court with possession of a stun gun, former MCL 750.224a, as amended by 2006 PA 457, and being a third-offense habitual offender, MCL 769.11, after he was seen wearing a stun gun on his belt at the party store in which he worked. Yanna moved to dismiss the possession charge, arguing that former MCL 750.224a violated his constitutional right to keep and bear arms. The court, Joseph K. Sheeran, J., agreed and granted the motion to dismiss the charge. The prosecution appealed.

John Collie was charged in the 60th District Court with possession of a stun gun under former MCL 750.224a and being a fourth-offense habitual offender, MCL 769.12, after he claimed ownership of it in the presence of a police officer. Collie moved to dismiss the possession charge, arguing that former MCL 750.224a was unconstitutional. The court, Andrew Wierengo, J., agreed and dismissed the charge. The Muskegon Circuit Court, Timothy G. Hicks, J., reversed and reinstituted the charges against Collie. Collie appealed by delayed leave granted, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. The Second Amendment of the United States Constitution protects the right of the people to keep and bear arms and is equivalent to the Michigan provision, Const 1963, art 1, § 6, which guarantees the right of every person to keep and bear arms for the defense of that person and the state. The Second Amendment extends its protections to all items that constitute bearable arms that were in common use at the time the amendment was written, as well as those that were not in existence at that time. Weapons that are not typically possessed by law-abiding citizens for lawful purposes are not protected, however, and the carrying of dangerous and unusual weapons has historically also been prohibited. Tasers and stun guns constitute protected arms within the mean-

ing of the federal and state constitutions because they are typically possessed by law-abiding citizens for lawful purposes, such as use for self-defense, and no evidence was presented that they are more dangerous than handguns, which are protected under the constitutions. Nor are they unusual weapons, being legal in 43 states and routinely used by law enforcement officers.

2. The Second Amendment protects the right to carry as well as keep arms, but concealed weapons may be banned, for example, and not offend this constitutional right. The complete ban on the possession of Tasers and stun guns by private citizens both in public as well as the home under MCL 750.224a is unconstitutional under the federal and state constitutions.

Bay Circuit Court's order dismissing the charges in *Yanna* affirmed.

Muskegon Circuit Court's order in *Collie* reversed and district court's order dismissing the charges reinstated.

WEAPONS — CONSTITUTIONAL LAW — RIGHT TO BEAR ARMS — TASERS AND STUN GUNS.

The Second Amendment of the United States Constitution protects the right of the people to keep and bear arms and is equivalent to Const 1963, art 1, § 6, which guarantees the right of every person to keep and bear arms for the defense of the person and the state; Second Amendment protections extend to all items that constitute bearable arms that were in common use at the time the amendment was written, as well as those that were not in existence at that time, such as handguns; weapons that are not typically possessed by law-abiding citizens for lawful purposes are not protected, and the carrying of dangerous and unusual weapons has historically been prohibited; Tasers and stun guns constitute arms for purposes of the Michigan and United States Constitutions, and a complete ban of ownership and possession of them violates the state and federal constitutions (MCL 750.224a, as amended by 2006 PA 457).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kurt C. Asbury*, Prosecuting Attorney, and *Sylvia L. Linton*, Assistant Prosecuting Attorney, for the people in *Yanna*.

Bay County Department of Public Defender (by *Kenneth M. Malkin*), for Dean Scott Yanna.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Tony Tague*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people in *Collie*.

Ladas & Hoopes Law Offices PLC (by *Paul M. Ladas*) for John Collie.

Amici Curiae:

The Smith Appellate Law Firm (by *Michael F. Smith)* and *Eugene Volokh*, for Arming Women Against Rape & Endangerment in *Yanna*.

Pence & Numinen, P.C. (by *Karl P. Numinen* and *Melanie J. Rohr*), for the Criminal Defense Attorneys of Michigan in *Yanna*.

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

SHAPIRO, J. In Docket No. 304293, the prosecution appealed the Bay Circuit Court's decision holding unconstitutional MCL 750.224a, which prohibits possession of Tasers and stun guns by private individuals.[1] In Docket No. 306144, we granted the defendant's application for leave to appeal the Muskegon Circuit Court's

[1] MCL 750.224a(1), as amended by 2006 PA 457, prohibits anyone other than law enforcement officers from selling, offering to sell, or possessing "a portable device or weapon from which an electrical current, impulse, wave, or beam may be directed, which current, impulse, wave, or beam is designed to incapacitate temporarily, injure, or kill." However, the Legislature recently passed a new version of this statute that would allow the possession of a Taser or stun gun by anyone with a valid license to carry a concealed pistol who has received training in the "use, effects, and risks of the device." MCL 750.224a(2)(b), as amended by 2012 PA 122, effective August 6, 2012. This opinion considers *only* the complete ban implemented by the statute under which defendant was arrested, not the partial ban of the new statute, and unless otherwise indicated, refers only to that former version.

order holding the same statute constitutional. Given the identical questions posed by these cases, we have consolidated them.[2] We hold that the version of MCL 750.224a at issue in these cases is unconstitutional. The Michigan and United States Constitutions protect a citizen's right to possess and carry Tasers or stun guns for self-defense, and the state may not completely prohibit their use by private citizens.

I. FACTS

The facts of Docket No. 304293 are not disputed. On Saturday June 5, 2010, the Bay City Police "received an anonymous telephone call stating that [defendant, Dean Yanna] was working behind the counter at Old Town Party Store . . . with a Taser on his belt." Officers responded to the party store and observed Yanna working behind the counter. Upon request, Yanna removed a stun gun[3] from his belt and turned it over to the police. The stun gun was transported back to the police department, where it was tested. The stun gun appeared to be fully operational and was tagged and secured into evidence.

Yanna was charged with possession of a stun gun in violation of MCL 750.224a and with being a third-offense habitual offender. Yanna filed a motion to dismiss, arguing that MCL 750.224a violated his right to

[2] Because this case involves the constitutionality of a state statute, following oral argument we issued an order inviting the Attorney General to file a brief on that issue. *People v Yanna*, unpublished order of the Court of Appeals, entered March 29, 2012 (Docket Nos. 304293 and 306144). The Attorney General declined to do so.

[3] The term "Taser," although a trademark for a particular brand of device, is commonly applied to a device that delivers an electric charge through barbs that can be propelled several feet away and penetrate clothing or skin. By contrast, a stun gun must be held in direct contact with the target.

keep and bear arms as provided for in both the federal and Michigan constitutions. The parties stipulated "for the purposes of arguing and deciding the constitutional issues . . . that the stun gun . . . discharges an electrical current that could incapacitate temporarily or injure but is generally nonlethal." On April 21, 2011, the trial court issued an opinion and order granting Yanna's motion to dismiss.

The facts of Docket No. 306144 are equally undisputed. According to the police report, on February 4, 2011, John Collie called the Muskegon Police Department and said that he needed his insulin medication but his wife would not let him in the house. A police officer arrived to assist Collie in getting his insulin and some other personal belongings. When the officer arrived, Collie informed the officer that his wife had told him that she wanted a divorce and taken his house key. After the officer spoke to Collie's wife, she opened the door and Collie began gathering his things. Collie then said he needed one more thing, which he called a "toy." He began looking for the item, and his wife held up a stun gun and asked if that was what he was looking for. He said it that was what he wanted, but the officer took custody of it. In his report, the officer stated that "[t]he Stun Gun when activated, displayed an approximately 1 inch long white/blue electrical current with a loud, intimidating crackling sound."

Collie was charged with possession of a stun gun and with being a fourth-offense habitual offender. Collie filed a motion to dismiss in the district court, arguing that MCL 750.224a was unconstitutional because possession of a stun gun within one's home was protected under the Second Amendment. The district court agreed and dismissed the charges, but the circuit court

reversed this decision on appeal. Collie applied for and received leave to appeal the circuit court's decision.[4]

II. ANALYSIS

This Court reviews de novo issues of constitutional construction. *Dep't of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008). The Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." US Const, AM II. In *District of Columbia v Heller*, 554 US 570, 592; 128 S Ct 2783; 171 L Ed 2d 637 (2008), the Court held that the Second Amendment "guarantee[s] the individual the right to possess and carry weapons in case of confrontation." The Second Amendment is fully applicable to the states through the Fourteenth Amendment. *McDonald v Chicago*, 561 US ___; 130 S Ct 3020, 3050; 177 L Ed 2d 894 (2010). Further, *Heller*'s formulation appears to be equivalent to the provision in Const 1963, art 1, § 6, which states, "Every person has a right to keep and bear arms for the defense of himself and the state." Both provisions grant individuals a right to keep and bear arms for self-defense. We will refer only to the Second Amendment for simplicity.

There are several issues to be considered. The first question is whether the objects banned by MCL 750.224a constitute "arms," such that they come within the ambit of the Second Amendment. This question must be answered in the affirmative.

The Court in *Heller* stated:

> The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's

[4] *People v Collie*, unpublished order of the Court of Appeals, entered October 25, 2011 (Docket No. 306144).

> dictionary defined "arms" as "[w]eapons of offence, or armour of defence." 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." [*Heller*, 554 US at 581 (citation omitted)].

Stun guns may be used both for defense or "to cast at or strike another." Therefore, MCL 750.224a does affect "arms." "[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id*. at 582. The prosecution argues that *Heller* is strictly a gun-control case, but the broad nature of the language used in *Heller*'s definition of "arms" clearly covers more than just firearms.

Heller did recognize certain limitations on the right to keep and bear arms. In some respects, these limitations are consistent with each other. However, they are not identical, and the United States Supreme Court neither fully harmonized them nor elevated one over another. First, the Court stated that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Id*. at 625. The Court further stated that "the sorts of weapons protected were those 'in common use at the time.' " *Id.* at 627 (citation omitted). As noted, however, this included weapons that did not exist when the Second Amendment was enacted. *Id.* at 582. Third, the Court referred to "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' " *Id.* at 627 (citation omitted).

The prosecution argues that stun guns are not suited for lawful defensive purposes and that they can easily be used for torturing someone tied to a chair or incapacitating an unsuspecting victim. This argument is

unavailing. One could easily produce an even lengthier list of criminal cases involving handguns, but the Supreme Court has determined that handguns are within the ambit of the Second Amendment. Hundreds of thousands of Tasers and stun guns have been sold to private citizens, with many more in use by law enforcement officers. Volokh, *Nonlethal self-defense, (almost entirely) nonlethal weapons, and the rights to keep and bear arms and defend life*, 62 Stan L Rev 199, 206 n 28, 212 (2009).[5] The prosecution fails to put forth evidence that would give the Court reason to doubt that the vast majority of Tasers and stun guns are possessed by law-abiding citizens for lawful purposes.

This Court previously upheld the prohibition of stun gun possession and ownership found in MCL 750.224a in *People v Smelter*, 175 Mich App 153, 155; 437 NW2d 341 (1989), apparently concluding that the weapons covered by the statute were customarily employed to violate the law. However, the only fact cited in *Smelter* was the capacity of the weapon seized from the defendant to temporarily incapacitate or even temporarily paralyze someone. *Smelter* did not cite any evidence that Tasers or stun guns are regularly used by criminals. *Smelter* cited *People v Brown*, 253 Mich 537; 235 NW 245 (1931), but the *Brown* Court specifically noted that the statute at issue prohibited "a partial inventory of the arsenal of the 'public enemy,' the 'gangster.' " *Brown*, 253 Mich at 542. Discussing blackjacks, the Court cited the Encyclopaedia Britannica, which described blackjacks as " 'a characteristic weapon of urban gangsters and rowdies.' " *Id.* Aside from the lack of factual support cited for *Smelter*'s conclusion, the legal

[5] Volokh's article cited a newspaper article from 1985 reporting that more than 300,000 stun guns had already been sold to police and civilians.

and factual landscape has altered in the last 23 years. By some reports, nearly 95 percent of police departments in America use Tasers.[6] Further, *Smelter* predated *Heller*. While the *Smelter* decision is entitled to some deference, it is not binding on this Court. MCR 7.215(J)(1). Because we have no reason to doubt that the majority of Tasers and stun guns are used only for lawful purposes, we decline to follow *Smelter*.

The prosecution also argues that stun guns and Tasers are so dangerous that they are not protected by the Second Amendment. However, it is difficult to see how this is so since *Heller* concluded that handguns are not sufficiently dangerous to be banned. Tasers and stun guns, while plainly dangerous, are substantially less dangerous than handguns. Therefore, tasers and stun guns do not constitute dangerous weapons for purposes of Second Amendment inquiries.

The prosecution also argues that Tasers and stun guns are "unusual" or rare weapons. However, they are legal in 43 states, and in Michigan are routinely used by law enforcement officers. They have been in use for several decades. Though far less prevalent than handguns, we do not think that stun guns or Tasers may be fairly labeled as unusual weapons.

Because Tasers and stun guns do not fit any of the exceptions to the Second Amendment enumerated in *Heller*, we find that they are protected arms. *Heller* held unconstitutional a law that completely banned the possession of protected arms in the home. *Heller*, 554

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[6] Hardy, *Taser's Latest Police Weapon: The Tiny Camera and the Cloud*, NY Times, February 21, 2012 (indicating that Taser International's cofounder and chief executive, claimed that tasers "are used by 17,000 of the 18,000 law enforcement agencies in the United States"), available at http://www.nytimes.com/2012/02/21/technology/tasers-latest-police-weapon-the-tiny-camera-and-the-cloud.html?pagewanted=1&ref=stunguns> (accessed June 5, 2012).

US at 628-629. We therefore hold that a complete ban on Tasers and stun guns in the home violates the Second Amendment.

The next question is whether the protected status of these arms makes unconstitutional a complete ban on carrying them in public. *Heller* specifically addressed only a full ban of protected weapons inside the home, not in public. Further, the analysis in *Heller* focused in part on the unmatched popularity of handguns for self-defense and did not make clear to what extent greater restrictions could be applied to less popular weapons.

On the other hand, *Heller* stated that concealed weapons may be banned, but made no such statement regarding openly carried arms. *Id*. at 626-627. Indeed, *Heller* cited with approval two state cases that struck down laws prohibiting the public carrying of handguns. *Id.* at 629. The Second Amendment explicitly protects the right to "carry" as well as the right to "keep" arms. Likewise, the Michigan Constitution specifically allows citizens to "bear" arms for self-defense. We therefore conclude that a total prohibition of the open carrying of protected arms such as a Taser or stun gun is unconstitutional.

Statutes are presumed to be constitutional unless their unconstitutionality is clearly apparent and must be construed as constitutional if possible. *City of Owosso v Pouillon*, 254 Mich App 210, 213; 657 NW2d 538 (2002). However, MCL 750.224a completely bans possession of Tasers and stun guns by private citizens in public and in the home and cannot be read as containing exceptions. We conclude that the statute is unconstitutional.

We therefore affirm the Bay Circuit Court's decision dismissing the charges against Yanna, and we reverse

the order of the Muskegon Circuit Court and reinstate the district court's order dismissing the charges against Collie.

M. J. KELLY, P.J., and WILDER, J., concurred with SHAPIRO, J.

SMITH v DEPARTMENT OF HUMAN SERVICES DIRECTOR

Docket Nos. 309447 and 309894. Submitted June 5, 2012, at Detroit. Decided June 26, 2012, at 9:05 a.m. Vacated, 493 Mich 947.

Megan Smith, Nicole Kelly, Roshawnda Williams, and Nicole Johnson brought an action against the Department of Human Services (DHS) Director in the Genesee Circuit Court, asserting that the director had exceeded her authority by implementing a 60-month time limit for receiving cash-assistance benefits from the state for members of plaintiffs' class. The DHS uses federal Temporary Assistance for Needy Families (TANF) funds to administer Michigan's Family Independence Program (FIP), which provides cash assistance to families who meet eligibility requirements. FIP assistance is limited to a cumulative total of 48 months, but some months in which assistance is received may be excluded from the recipient's cumulative total if certain exemptions apply. Federal law generally provides for a 60-month limit on the use of TANF funds. The DHS Director decided to terminate FIP assistance to those recipients who had exhausted the federal 60-month TANF limit even if those recipients had not exhausted the state's 48-month limit because some months had been excluded in calculating the cumulative total. Plaintiffs brought their action on behalf of themselves and other similarly situated individuals to challenge the DHS Director's authority to impose the 60-month time limit through the implementation of an administrative policy. The court, Geoffrey L. Neithercut, J., granted plaintiffs' motion for a preliminary injunction to enjoin the DHS Director from terminating cash-assistance benefits on the basis of the 60-month limit. The court also ordered that the case could proceed as a class action on behalf of all current and future FIP recipients who had been or would be denied or terminated from FIP assistance on the basis of the 60-month limit when they had not received FIP assistance for 48 countable months under Michigan's Social Welfare Act. Defendant filed an interlocutory application for leave to appeal. In lieu of granting leave to appeal, the Court of Appeals, M. J. KELLY, P.J., and METER and RONAYNE KRAUSE, JJ., reversed the order granting the preliminary injunction and vacated the preliminary injunction, in an unpublished order, issued November 3, 2011 (Docket No. 306846). The circuit court subsequently granted summary dispo-

sition in favor of plaintiffs, concluding that the DHS Director had exceeded her authority under the separation of powers doctrine. The circuit court entered a judgment permanently enjoining the DHS Director from terminating or denying cash-assistance benefits based on time limits other than the 48-countable-months limit set in the Social Welfare Act. Plaintiffs appealed with regard to the circuit court's order granting summary disposition (Docket No. 309447) and with regard to the injunctive relief ordered by the circuit court (Docket No. 309894). With regard to Docket No. 309447, the DHS Director filed an application for leave to appeal in the Supreme Court before a decision by the Court of Appeals. The Supreme Court denied the bypass application, but directed the Court of Appeals to decide the case on an expedited basis. 491 Mich 898 (2012). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Under the 1963 Michigan Constitution, the powers of government are divided into three branches: legislative, executive, and judicial. No person exercising the powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in the Constitution. An administrative agency that acts outside its statutory boundaries usurps the role of the Legislature. MCL 400.57b(1)(f) authorizes the DHS to add eligibility criteria that are not required for federal or state funds but are necessary to accomplish the goals of the FIP. One of the goals of the FIP is to achieve its efficient, fair, and cost-effective administration, and the DHS Director averred in an affidavit that fiscal soundness was one of the reasons for terminating FIP assistance when TANF funds are exhausted. Accordingly, the DHS Director was statutorily authorized to add the challenged eligibility criterion, and the circuit court erred by concluding that the DHS Director did not have the authority under the Social Welfare Act to limit FIP assistance to 60 months. There was no violation of the separation of powers doctrine.

2. Under the Social Welfare Act, the DHS may promulgate all rules necessary or desirable for the administration of programs under the act. Those rules must generally be promulgated under the Administrative Procedures Act. However, the DHS may develop policies to implement requirements that are mandated by federal statutes or regulations as a condition of the receipt of federal funds, and policies so developed are exempt from the rule promulgation requirements of the Administrative Procedures Act. Under the federal TANF statutes, a state to which a grant is made may not use any part of the grant to provide assistance to a family which includes an adult who has received assistance under any

state program funded by TANF attributable to funds provided by the federal government for 60 months, whether or not consecutive, after the date the state program so funded commences. Thus, by cutting off federal funds from individuals after they received 60 months of benefits, the DHS was following a federal mandate and did not need to follow the rulemaking procedures outlined in the APA. However, to the extent that the pertinent FIP benefits were derived from state funds, the policy was not mandated by federal statutes or regulations and, accordingly, the policy was required to be promulgated as a rule under the APA. The failure of the DHS to follow the procedures for promulgating rules rendered the policy invalid to the extent that state funding was involved, and the trial court correctly ruled the policy invalid to that extent.

3. The prerequisites for a class action are (1) a class so numerous that joinder of all members is impracticable, (2) questions of law or fact common to the members of the class that predominate over questions affecting only individual members, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately assert and protect the interests of the class, and (5) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. The circuit court did not clearly err by concluding that the validity of the DHS Director's implementation of the 60-month time limit was a predominating issue of law. Further, the requirement that maintenance of the action as a class action be superior to other available methods of adjudication is, in essence, a practicality test. The possible effect of the case on funding for FIP assistance would not be a proper consideration in determining whether maintenance of the action as a class action would be superior to other available methods of adjudication. And, contrary to the DHS's argument, an action for declaratory judgment under MCL 24.264 would not have been applicable to plaintiffs' claim because it did not involve promulgated rules. The DHS Director failed to establish any basis for reversing the circuit court's decision to certify the case as a class action.

Affirmed in part, reversed in part, and remanded for further proceedings.

1. CONSTITUTIONAL LAW — SEPARATION OF POWERS — ADMINISTRATIVE AGENCIES — RULEMAKING.

Under the 1963 Michigan Constitution, the powers of government are divided into three branches: legislative, executive, and judicial;

no person exercising the powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in the Constitution; an administrative agency that acts outside its statutory boundaries usurps the role of the Legislature; the Department of Human Services (DHS) is statutorily authorized to add eligibility criteria for the receipt of Family Independence Program benefits that are not required for federal or state funding but are necessary to accomplish the goals of the program; one of the goals of the program is to achieve its efficient, fair, and cost-effective administration; accordingly, the DHS is statutorily authorized to add eligibility criteria that promote the program's efficient, fair, and cost-effective administration and may do so without violating the separation of powers doctrine (Const 1963, art 3, § 2; MCL 400.57a[3][a], MCL 400.57b[1][f]).

2. ADMINISTRATIVE LAW — AGENCIES — RULEMAKING AUTHORITY.

Under the Social Welfare Act, the Department of Human Services (DHS) may promulgate all rules necessary or desirable for the administration of programs under the act; those rules must generally be promulgated under the Administrative Procedures Act (APA), but the DHS may develop policies to implement requirements that are mandated by federal statutes or regulations as a condition of the receipt of federal funds, and policies so developed are exempt from the rule promulgation requirements of the APA (MCL 400.6).

3. ACTIONS — CLASS ACTIONS — PREREQUISITES FOR CLASS CERTIFICATION.

The prerequisites for a class action are (1) a class so numerous that joinder of all members is impracticable, (2) questions of law or fact common to the members of the class that predominate over questions affecting only individual members, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately assert and protect the interests of the class, and (5) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice (MCR 3.501[A][1]).

Jacqueline Doig and *Terri L. Stangl* for plaintiffs.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Joseph E. Potchen*, Assistant Attorney General, for defendant.

Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

METER, J. These consolidated appeals involve a class action by individuals whose benefits under a cash-assistance program administrated by the Department of Human Services (DHS) in accordance with the Social Welfare Act, MCL 400.1 *et seq*., were terminated. In Docket No. 309447, defendant, the DHS Director, appeals as of right the circuit court's order granting summary disposition in favor of plaintiffs with respect to their claim that the DHS Director exceeded her authority by implementing a 60-month time limit for receiving cash-assistance benefits for members of plaintiffs' class. In Docket No 309894, the DHS Director appeals as of right the injunctive relief ordered by the circuit court on the basis of that determination. We affirm in part and reverse in part.

I. BACKGROUND

This case involves cash-assistance benefits provided to individuals under the Family Independence Program (FIP), as established under the Social Welfare Act and amended by 2011 PA 131, effective October 1, 2011. Pursuant to MCL 400.57a(1), "[t]he department[1] shall establish and administer the family independence program to provide assistance to families who are making efforts to achieve independence." The time limit established by the Legislature for FIP assistance to be paid to an individual, beginning October 1, 2007, is "not longer

[1] The "department" is defined in the Social Welfare Act to mean the Family Independence Agency. MCL 400.1(4). The Family Independency Agency was renamed the Department of Human Services pursuant to an executive reorganization order effective March 15, 2005. See MCL 400.226. The executive order states that all statutory references to the Family Independence Agency shall be deemed references to the Department of Human Services. See *id*.

than a cumulative total of 48 months during that individual's lifetime." MCL 400.57r. A recipient of FIP assistance who does not comply with his or her individual family-self-sufficiency plan is penalized by having payments temporarily or permanently terminated, and those penalty months are still counted toward the 48-month total. MCL 400.57g(4). The Social Welfare Act also contains exclusions from the 48-month limit, even though payment is made to a recipient. MCL 400.57p.

The instant class action arose because the DHS uses federal Temporary Assistance for Needy Families (TANF) funds to administer the FIP, and application of the 48-month limit under the Social Welfare Act with the exemptions established by the Legislature leaves some individuals eligible for FIP benefits even though they have exhausted TANF funds.

The purpose of TANF is to provide flexibility for states in operating a program designed to:

> (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
>
> (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
>
> (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
>
> (4) encourage the formation and maintenance of two-parent families. [42 USC 601(a).]

42 USC 601(b) specifies that the statutory provisions concerning TANF funds "shall not be interpreted to entitle any individual or family to assistance under any State program funded" by TANF. Federal law generally provides for a 60-month limit on the use of TANF

funds,[2] 42 USC 608(a)(7)(A), but that limit is subject to the following express rules of interpretation:

> **(E) Rule of interpretation**
>
> Subparagraph (A) shall not be interpreted to require any State to provide assistance to any individual for any period of time under the State program funded under this part [42 USC 601 through 42 USC 619].
>
> **(F) Rule of interpretation**
>
> This part shall not be interpreted to prohibit any State from expending State funds not originating with the Federal Government on benefits for children or families that have become ineligible for assistance under the State program funded under this part by reason of subparagraph (A). [42 USC 608(a)(7).]

Each of the four plaintiffs in this case received a "NOTICE OF CASE ACTION" from the DHS, dated October 11, 2011, which specified that FIP benefits were being cancelled effective November 10, 2011, for the following reason:

> The intended action results from a change in law and policy that placed a lifetime time limit on the receipt of assistance through the Family Independence Program. Your group is no longer eligible for the Family Independence Program because the person(s) listed below has received 60 months or more of benefits, which is the time limit allowable for eligibility.

The notice informed each plaintiff that they had the right to a hearing to contest the DHS's calculation that assistance should stop because of the 60-month limit. The notice was provided to affected recipients of the cash-assistance benefits pursuant to an action in the

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[2] While a state may exempt a family from the 60-month limitation by reason of hardship subject to certain limitations under 42 USC 608(a)(7)(C), it is undisputed in this case that the DHS's current policy does not allow for hardship exemptions.

United States District Court in which the adequacy of prior notices provided by the DHS was challenged by various individuals on procedural due-process grounds. See *Kelly v Corrigan*, unpublished order of the United States District Court for the Eastern District of Michigan, entered October 4, 2011 (Docket No. 11-14298).

On October 28, 2011, plaintiffs filed this action against the DHS Director on behalf of themselves and other similarly situated individuals[3] to challenge the DHS Director's authority to impose the 60-month time limit through the implementation of an administrative policy. The circuit court initially granted plaintiffs' motion for a preliminary injunction to enjoin the DHS Director from terminating the cash-assistance benefits on the basis of the 60-month limit. The circuit court also ordered that the case could proceed as a class action on behalf of "all current and future FIP recipients who have been or will be denied or terminated from FIP assistance based on a 60 month limit when they have not received FIP for 48 countable months under the Social Welfare Act."

In an earlier interlocutory appeal in this case, this Court, in lieu of granting leave to appeal, peremptorily reversed and vacated the preliminary injunction because "[p]laintiffs failed to establish a likelihood of prevailing on the merits of their claim." *Smith v Dep't of Human Servs Dir*, unpublished order of the Court of Appeals, entered November 3, 2011 (Docket No. 306846). Following this decision, the DHS Director moved for reconsideration of the circuit court's order granting the class certification. The DHS Director also moved for summary disposition under MCR 2.116(C)(8)

[3] Plaintiffs also filed the action as next friends of their minor children, but the circuit court did not rule on their motions to be appointed as next friends.

and (C)(10) with respect to plaintiffs' substantive claim, while plaintiffs moved for summary disposition under MCR 2.116(C)(10).

The circuit court denied the DHS Director's motion for reconsideration. In addition, it resolved the cross-motions for summary disposition in favor of plaintiffs on the basis of its determinations that (1) the Social Welfare Act created an entitlement to FIP assistance for individuals who comply with the FIP's family-self-sufficiency plan and (2) the DHS Director exceeded her authority under the separation of powers doctrine by imposing time limits that are not authorized by the Social Welfare Act. On the basis of those determinations, the circuit court entered a judgment (1) permanently enjoining the DHS Director from terminating or denying cash-assistance benefits "based on time limits unless and until it is determined that [class members] have received [benefits] for more than forty-eight countable months under the time limits set by the Social Welfare Act" and (2) enjoining the DHS Director from terminating or denying cash-assistance benefits "to Plaintiffs and members of the Class based on a 60 month limit that starts counting months prior to the October 1, 2007 started [sic] date established by statute and does not have the exemptions required by the Social Welfare Act[.]"

The DHS Director filed two appeals with this Court to challenge the circuit court's determinations. In Docket No. 309447, the Michigan Supreme Court denied the DHS Director's bypass application for leave to appeal, but directed this Court to consider the case on an expedited basis, stating:

> The Court of Appeals is directed to decide this case on an expedited basis, considering whether (1) the circuit

> court erred in concluding that defendant may not implement limits on the duration of welfare benefits as part of its authority to establish eligibility criteria for family independence program recipients under MCL 400.57a(3) and/or MCL 400.57b(1)(f) and, if so, (2) whether plaintiffs are entitled to summary disposition on the alternative ground that defendant failed to comply with the requirements of the Administrative Procedures Act [APA], MCL 24.201 *et seq*. [*Smith v Dep't of Human Servs Dir*, 491 Mich 898 (2012).]

II. STANDARD OF REVIEW

We review de novo a circuit court's decision concerning a motion for summary disposition. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). Issues involving statutory construction are also reviewed de novo. *Id*. Whether the constitutional principle of separation of powers was violated is also reviewed de novo. *People v Garza*, 469 Mich 431, 433; 670 NW2d 662 (2003).

Although the circuit court did not state the subpart of MCR 2.116(C) on which it relied to resolve the parties' cross-motions for summary disposition, because the parties' motions relied on evidence that went beyond the documentary evidence filed with plaintiffs' complaint, we find review under MCR 2.116(C)(10) appropriate. See *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim based on substantively admissible evidence. MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). A court should grant the motion if the submitted evidence fails to establish a genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424-425; 751 NW2d 8 (2008).

III. SEPARATION OF POWERS

Because the circuit court's decision to invalidate the DHS Director's action rested on a determination that the separation of powers doctrine was violated, we shall first address the applicability of this doctrine to the parties' dispute. Const 1963, art 3, § 2, states, "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Under this provision, the executive branch has the duty of executing the laws enacted by the legislative branch. See *Kyser v Kasson Twp*, 486 Mich 514, 535; 786 NW2d 543 (2010). "An administrative agency that acts outside its statutory boundaries usurps the role of the legislature." *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 583; 810 NW2d 110 (2011). Accordingly, whether the circuit court erred by finding a violation of the separation of powers doctrine depends on the powers conferred by the Legislature on the DHS. We turn to the Social Welfare Act to determine if the DHS Director had authority to terminate FIP assistance on the basis of the 60-month time limit for TANF funds.

In interpreting the DHS's authority under the Social Welfare Act, our primary goal is to ascertain the legislative intent by first examining the plain language of the statute. *Driver*, 490 Mich at 246-247. "Statutory provisions must be read in the context of the entire act . . . ." *Id*. at 247. An undefined statutory term is given its plain and ordinary meaning unless it is a term of art with a unique legal meaning. *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 156; 809 NW2d 444 (2011). "When a statute specifically defines a given

term, that definition alone controls." *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). If a statute is unambiguous, it is applied as written. *Driver*, 490 Mich at 247. "A statutory provision is ambiguous if it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning." *AFSCME*, 293 Mich App at 155. If a statutory provision is ambiguous, judicial interpretation is appropriate. *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 434; 770 NW2d 105 (2009). An administrative agency's construction of a statute that it is charged with executing is entitled to respectful consideration, but is not binding on courts and cannot conflict with the plain language of a statute. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103, 111-112; 754 NW2d 259 (2008).

The circuit court began its review of the DHS's authority by considering whether the Social Welfare Act created an entitlement program. However, because the present issue does not involve whether the DHS Director took action that deprived the class members of due process, but rather whether the DHS Director had authority under the Social Welfare Act to apply the 60-month limit applicable for TANF funds to FIP assistance, we find it unnecessary to address whether an entitlement program existed for due-process purposes. Upon review de novo of the relevant statutory provisions in light of the act as whole, we hold that the circuit court erred by finding that the DHS Director violated the Social Welfare Act—in particular, the exemptions to the 48-month limit established by MCL 400.57p—by imposing a 60-month limit on FIP assistance.

MCL 400.57p states:

> Any month in which a recipient has been exempted from the JET program[4] under section 57f(3) or (4)(b) shall not be counted toward the cumulative total of 48 months in a lifetime for family independence program assistance. Any month in which a recipient has been exempted from the JET program under section 57f(4)(e) or (f) may, in the department's discretion, be excluded from the count toward the cumulative total of 48 months in a lifetime for family independence program assistance.

Read in the context of MCL 400.57r, which establishes an individual's lifetime limit for FIP assistance as "not longer than a cumulative total of 48 months," it is clear that the Legislature contemplated that actual payments could extend beyond the 48-month limit if a recipient has been exempted from the JET program.

There is no statutory language that limits actual payments to 60 months. However, considering that the 60-month limit approved by the DHS Director in this case arises from limitations on TANF funding for individuals, the circuit court erred by concluding that the DHS Director has no authority under the Social Welfare Act to impose this limitation. Other statutory provisions, which operate independently of MCL 400.57p, authorize the DHS to use the exhaustion of TANF funding as an eligibility criterion for individuals.

Initially, we note that we reject the DHS Director's argument that the duties imposed on the DHS under MCL 400.57a(3) with respect to the "composition of the program group," standing alone, provide authority to establish an individual's exhaustion of TANF funds as an eligibility criterion. MCL 400.57a(3) provides:

---

[4] "JET program" is defined in MCL 400.57(1)(i) as "the jobs, education and training program administered by the Michigan economic development corporation or a successor entity for applicants and recipients of family independence program assistance or a successor program."

> The department shall establish income and asset levels for *eligibility*, types of income and assets to be considered in making *eligibility* determinations, payment standards, *composition* of the program group and the family independence program assistance group, program budgeting and accounting methods, and client reporting requirements to meet the following goals:
>
> (a) Efficient, fair, cost-effective administration of the family independence program.
>
> (b) Provision of family independence program assistance to families willing to work toward eventual self-sufficiency. [Emphasis added.]

In interpreting a statute, a court considers both the plain meaning of a critical word or phrase and its placement and purpose in the statutory scheme. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). A court may consult a dictionary to determine the ordinary meaning of an undefined term. *Haynes*, 477 Mich at 36. The words in a statute should be read together to harmonize the meaning and give effect to the act as a whole. *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003).

Random House Webster's College Dictionary (1997) defines the word "eligible," in relevant part, as "meeting the stipulated requirements; qualified." The word "eligibility" as used in MCL 400.57a(3), examined in context, plainly depends on income and asset levels. The *Random House Webster's College Dictionary* (1997) defines "composition," in relevant part, as "the manner of being composed; arrangement or combination of parts or elements" and "the parts or elements of which something is composed; makeup; constitution." As used in MCL 400.57a(3), the term "composition" requires a determination of the "program group" and the "family independence program assistance group." While the

DHS is permitted to take action that serves the goal of a cost-effective FIP, "program group" and "family independence program assistance group" are both statutorily defined phrases. "Program group" is defined as "a family and all those individuals living with a family whose income and assets are considered for purposes of determining financial eligibility for family independence program assistance." MCL 400.57(1)(n). "Family independence program assistance group" is defined as "all those members of a program group who receive family independence program assistance." MCL 400.57(1)(f).

As a whole, MCL 400.57a(3) permits the DHS to determine issues involving financial eligibility using income and asset information. The DHS is also authorized to determine which individuals make up the program group. However, standing alone, the statute does not authorize the DHS to add an eligibility criterion based on whether TANF funding has been exhausted for an individual because of the federal 60-month limit. Nonetheless, MCL 400.57b(1) provides:

> An individual who meets all of the following requirements is eligible for family independence program assistance:
>
> (a) Is a member of a family or a family independence program assistance group.
>
> (b) Is a member of a program group whose income and assets are less than the income and asset limits set by the department.
>
> (c) In the case of a minor parent, meets the requirements of subsection (2).
>
> (d) Is a United States citizen, a permanent resident alien, or a refugee. If the applicant indicates that he or she is not a United States citizen, the department shall verify

> the applicant's immigration status using the federal systematic alien verification for entitlements (SAVE) program.
>
> (e) Is a resident of this state as described in section 32.
>
> (f) Meets any other eligibility criterion required for the receipt of federal or state funds *or determined by the department to be necessary for the accomplishment of the goals of the family independence program*. [Emphasis added.]

"The commonly understood word 'any' generally casts a wide net and encompasses a wide range of things." *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). Therefore, it is plain that the Legislature authorized the DHS to add an eligibility criterion that is not required for federal or state funds but is necessary to accomplish the goals of the FIP. Further, MCL 400.57a(3)(a) establishes that one goal of the FIP is to achieve an efficient, fair, cost-effective administration of the FIP, and the DHS Director's affidavit filed in support of her motion for summary disposition indicates that "fiscal soundness" is one of the purposes for terminating FIP assistance when TANF funds are exhausted. Thus, MCL 400.57a(3) and MCL 400.57b(1)(f), read together, are reasonably construed as permitting the DHS to consider its added eligibility criterion for purposes of deciding the composition of the program group and the family independence program assistance group. In addition, the DHS had no duty to consider hardship criteria to extend the 60-month period because the use of the phrase "[t]he State may exempt" in the applicable federal law, 42 USC 608(a)(7)(C)(i), denotes permissive action. See *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008) (noting that the word "may" is generally an indication of permissive action).

In sum, the circuit court erred by granting plaintiffs summary disposition based on the doctrine of separa-

tion of powers. MCL 400.57a(3)(a) and MCL 400.57b(1)(f) provide statutory authority for the DHS Director's reliance on fiscal soundness to add an eligibility criterion that would disqualify individuals from FIP assistance based on the exhaustion of federal TANF funds.

IV. ADMINISTRATIVE PROCEDURES ACT

Plaintiffs nevertheless contend that they are entitled to summary disposition because the DHS did not follow the rulemaking procedures of the APA. This issue requires consideration of general provisions in the Social Welfare Act, see MCL 400.6, that are applicable to the DHS, as well as consideration of relevant provisions of the APA. MCL 400.6, provides, in pertinent part:

> (1) The family independence agency may promulgate all rules necessary or desirable for the administration of programs under this act. Rules shall be promulgated under the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. Beginning 2 years after the effective date of subsection (2), if the Michigan supreme court rules that sections 45 and 46 of Act No. 306 of the Public Acts of 1969, being sections 24.245 and 24.246 of the Michigan Compiled Laws, are unconstitutional and a statute requiring legislative review of administrative rules is not enacted within 90 days after the Michigan supreme court ruling, this subsection does not apply.
>
> (2) The family independence agency may develop regulations to implement the goals and principles of assistance programs created under this act, including all standards and policies related to applicants and recipients that are necessary or desirable to administer the programs. These regulations are effective and binding on all those affected by the assistance programs. Except for policies described in subsections (3) and (4), regulations described in this sub-

> section, setting standards and policies necessary or desirable to administer the programs, are exempt until the expiration of 12 months after the effective date of this subsection from the rule promulgation requirements of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. Upon the expiration of 12 months after the effective date of this subsection, regulations described in this subsection are not effective and binding unless processed as emergency rules under section 48 of Act No. 306 of the Public Acts of 1969, being section 24.248 of the Michigan Compiled Laws, or promulgated in accordance with Act No. 306 of the Public Acts of 1969.
>
> (3) The family independence agency may develop policies to establish income and asset limits, types of income and assets to be considered for eligibility, and payment standards for assistance programs administered under this act. Policies developed under this subsection are effective and binding on all those affected by the assistance programs. Policies described in this subsection are exempt from the rule promulgation requirements of Act No. 306 of the Public Acts of 1969. Not less than 30 days before policies developed under this subsection are implemented, they shall be submitted to the senate and house standing committees and appropriation subcommittees with oversight of human services.
>
> (4) *The family independence agency may develop policies to implement requirements that are mandated by federal statute or regulations as a condition of receipt of federal funds.* Policies developed under this subsection are effective and binding on all those affected by the programs. *Policies described in this subsection are exempt from the rule promulgation requirements of Act No. 306 of the Public Acts of 1969.* [Emphasis added.]

The DHS Director argues that MCL 400.6(4) applies to the pertinent policy because the DHS is implementing a federal requirement that TANF funds not be paid to persons for more than a cumulative period of 60

months. *To the extent that only federal monies are involved*, we agree. 42 USC 608(a)(7)(A) states:

> A State to which a grant is made under section 603 of this title shall not use any part of the grant to provide assistance to a family that includes an adult who has received assistance under any State program funded under this part attributable to funds provided by the Federal Government, for 60 months (whether or not consecutive) after the date the State program funded under this part commences, subject to this paragraph.

By cutting off federal funds from individuals after they have received 60 months of benefits, the DHS is following a federal mandate and need not follow the rulemaking procedures outlined in the APA. MCL 400.6(4). Plaintiffs argue that the federal 60-month limit is not a mandate (even assuming, arguendo, that only federal funds are at issue) because the federal law also allows for optional hardship exemptions that can extend the 60-month limit. However, we conclude that (1) there is a clear mandate involving a 60-month limit, (2) there are optional exemptions, and (3) the existence of the *option* for exemptions does not somehow extinguish the mandate.

While there is an exemption from the rulemaking requirements for the cutting off of federal monies, it is clear that some state funds are used in administering the FIP program. To the extent that plaintiffs would be entitled to FIP benefits derived from state funds, we find a violation of the APA in connection with the challenged policy. Indeed, the deprivation of state funding otherwise provided by state law cannot reasonably be deemed a federal mandate under MCL 400.6(4). The DHS Director focuses on the amendment of the "Group Composition" section of Michigan's TANF State Plan and related policies, but the DHS's authority to exclude

a person from a group stems, as previously discussed, from its authority to add an eligibility criterion that the DHS determines is necessary to accomplish the FIP goals under MCL 400.57b(1)(f). The eligibility criterion plainly falls within the broad provision in MCL 400.6(2), which requires rulemaking under the APA for "all standards and policies related to applicants and recipients that are necessary or desirable to administer the programs."

The DHS Director has also failed to establish any provision of the APA that would exempt the DHS from developing its policy as a rule under the APA. "Rule" is defined in the APA as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency." MCL 24.207. The APA also specifies numerous agency actions that do not constitute a rule. MCL 24.207. The DHS Director relies on the exception set forth in MCL 24.207(j): "A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected."[5] We reject the DHS Director's claim that the exception set forth in MCL 24.207(j) applies. MCL 400.57a(3) provides that the DHS "shall establish . . . composition of the program group and the family independence program assistance group . . . ." The word "shall" denotes mandatory action. *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006). A mandatory

[5] The DHS Director also relies on MCL 24.207(o), an exception for federal mandates. The cutting off of *state funds*, as noted earlier, cannot be considered a federal mandate.

action does not fall within the exception set forth in MCL 24.207(j). *Spear v Mich Rehab Servs*, 202 Mich App 1, 4-5; 507 NW2d 761 (1993).

The DHS Director's claim could, at first blush, have merit if it is considered in light of the DHS's authority to add an eligibility criterion under MCL 400.57b(1)(f). However, MCL 400.6(2) mandates that the DHS process such regulations as emergency rules or promulgated rules under the APA. The APA provides that "[t]his act shall not be construed to repeal additional requirements imposed by law." MCL 24.211. Because the Social Welfare Act mandates rulemaking under the APA, the DHS's added eligibility criterion is not exempt from the APA. See *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Servs*, 431 Mich 172, 186-188; 428 NW2d 335 (1988) (concluding that the agency's attempt to implement a mandatory hearing policy did not constitute the exercise of permissive statutory authority under MCL 24.207(j) when the statute applicable to the agency mandated that hearings be conducted pursuant to promulgated rules).[6]

An agency's failure to substantially comply with the procedural requirements for promulgating rules under the APA renders a rule invalid and precludes it from having the force of law. MCL 24.243; *Goins v Greenfield Jeep Eagle, Inc*, 449 Mich 1, 9-10; 534 NW2d 467 (1995). Because the DHS's policy constitutes a rule, no exception to the rulemaking requirements of the APA applies, and the DHS failed to follow the procedures for promulgating rules, the circuit court correctly concluded that

[6] Because MCL 400.6(2) applies, it is unnecessary to consider plaintiffs' argument based on *Palozolo v Dep't of Social Servs*, 189 Mich App 530; 473 NW2d 765 (1991).

the rule is invalid to the extent that state funding is involved.[7]

V. CLASS CERTIFICATION

The DHS Director also argues that the circuit court erred by certifying the plaintiffs' case as a class action under MCR 3.501. We disagree.

We review de novo the proper interpretation of MCR 3.501. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). We review for clear error any factual findings made by the circuit court. *Id*. We review the court's discretionary decisions for an abuse of discretion. *Id*. "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

Contrary to the DHS Director's argument on appeal, the circuit court was not required to apply the federal "rigorous analysis" approach to determine whether to certify the class action. MCR 3.501(A) provides sufficient guidance for considering a request for class certification. *Henry*, 484 Mich at 502. MCR 3.501(A)(1) contains the following prerequisites for a class action:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

[7] The record is not clear regarding how the FIP program operates in terms of distributing state funds versus federal funds. Further proceedings may serve to clarify this issue.

> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

The DHS Director focuses on subparts (b) and (e). We reject the DHS Director's argument that plaintiffs' class fails the commonality requirement of MCR 3.501(A)(1)(b). This prerequisite only requires "the common issue or issues to predominate over those that require individualized proof." *Hill v City of Warren*, 276 Mich App 299, 311; 740 NW2d 706 (2007). The circuit court did not clearly err by finding a predominating issue of law concerning the validity of the DHS Director's implementation of a 60-month time limit for receiving cash-assistance benefits.

With respect to MCR 3.501(A)(1)(e), the court rule provides a number of factors that a trial court should consider when evaluating whether a class action would be superior to other forms of adjudication. MCR 3.501(A)(2). This prerequisite to class certification is essentially a practicality test that promotes the convenient administration of justice. *Hill*, 276 Mich App at 314. A court should not evaluate the merits of the case when determining whether to certify a class action. *Henry*, 484 Mich at 504-505. Therefore, we reject the DHS Director's argument that the possible effect of this case on funding for FIP assistance weighs against the circuit court's finding that a class action was a superior means of adjudication.

We also reject the DHS Director's argument that plaintiffs should have pursued their claim by requesting a declaratory ruling from the DHS, followed by an action to obtain a declaratory judgment, under the APA. See MCL 24.263 and MCL 24.264. An action for a

declaratory judgment authorized by MCL 24.264 was not applicable to plaintiffs' claim because it does not involve promulgated rules. See *Jones v Dep't of Corrections*, 185 Mich App 134, 137; 460 NW2d 575 (1990), and *Bentley v Dep't of Corrections*, 169 Mich App 264, 270; 425 NW2d 778 (1988). In addition, MCL 24.263 did not apply because plaintiffs were not seeking to apply a rule to an actual set of facts, but rather to have an administrative policy that was not promulgated as a rule declared invalid. See *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 119 n 7; 807 NW2d 866 (2011). In any event, it is clear from the record that the circuit court's concern was that individual actions could lead to different rulings on a question of law. We conclude that the DHS Director has failed to establish any basis for reversal of the circuit court's decision that the class action was a superior means of adjudicating the question of law in this case.

Affirmed in part, reversed in part, and remanded[8] for further proceedings consistent with this opinion. We do not retain jurisdiction.

SERVITTO, P.J., and FORT HOOD, J., concurred with METER, J.

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[8] Certain aspects of the circuit court's decision were erroneous, and we thus remand for entry of an order that comports with our decision today.

CLARKE v CLARKE

Docket No. 303580. Submitted April 4, 2012, at Detroit. Decided June 26, 2012, at 9:10 a.m.

Plaintiff, Edwin R. Clarke, III, and defendant, Cynthia A. Clarke, entered into a consent judgment of divorce in the Washtenaw Circuit Court, which adopted the terms of the parties' settlement agreement. The parties shared joint physical and legal custody of their son and no child support was awarded at that time. Plaintiff thereafter lost his job, sought and was awarded child support. In 2010, plaintiff, who was 64 years old, looked into the possibility of receiving social security retirement benefits then, as opposed to waiting for a larger monthly amount were he to wait until the age of 66. The parties' son would also have been eligible for dependent benefits each month until he either turned 18 years old or graduated from high school if plaintiff had opted to receive social security benefits at the age of 64. Plaintiff attempted to negotiate an agreement with defendant on the allocation of the dependent benefit between the two households if plaintiff opted to begin collecting social security retirement benefits at the earlier time. Plaintiff applied for and received social security retirements benefits from July 2010 through September 2010 at which point plaintiff discovered that the dependent benefit had been sent to defendant since July 2010 without his knowledge. Plaintiff withdrew his social security application and repaid to the social security administration all monies he had received. The friend of the court hearing referee recommended in December 2010 that defendant's obligation to pay child support be terminated on the basis that plaintiff's eligibility for social security benefits should be imputed as income, and that plaintiff should then pay child support to defendant because their son had been living with her exclusively since January 2010 following a disagreement between plaintiff and the son. The court, Archie C. Brown, J., imputed plaintiff's social security benefits as income, reasoning that it was income plaintiff had the ability to earn but had voluntarily eliminated. The court ordered plaintiff to pay child support retroactive to the date of filing of the petition, discontinued defendant's child support obligation, and granted defendant the federal dependency tax exemption for the 2010 tax year because

the parties' son had not spent a night with plaintiff since their argument in January 2010. Plaintiff appealed by leave granted.

The Court of Appeals *held*:

1. Whether the trial court properly applies the Michigan Child Support Formula (MCSF) is a question of law that is reviewed de novo. Under MCL 552.519(3)(a)(vi), the State Court Administrative Office Friend of the Court Bureau has authority to develop a formula for establishing and modifying child support obligations. The trial court must use the formula when determining child support and may deviate from the formula only if the formula would be unjust or inappropriate based on the facts of the case. The trial court must set forth on the record the reasons for the deviation. MCL 552.605(2).

2. Under 2008 MCSF 2.01(B), the objective for determining a parent's income is to establish as accurately as possible how much money a parent has available for support. When imputing income the amount should be sufficient to bring the parent's income up to the level it would have been if the parent had not voluntarily reduced or waived income. 2008 MCSF 2.01(G)(1). Income in part includes distributed payments from social security benefits. 2008 MCSF 2.01(C)(3). While only retirement benefits that are actually paid from the Social Security Administration and delivered to the recipient may be considered part of a parent's income for purposes of calculating child support obligations under the MCSF, under 2008 MCSF 2.01(G), potential income may be imputed to a parent when he or she is voluntarily unemployed or underemployed or has an unexercised ability to earn income. Applying the factors set forth in 2008 MCSF 2.01(G)(2), the trial court must determine whether the parent has an actual ability to earn and reasonable likelihood of earning the potential income before imputing the income and the court's decision must be supported by adequate fact-finding. When the evidence establishes that a parent has declined to receive early social security retirement benefits in order to receive a higher benefit at a later time, that parent has not demonstrated an unexercised ability to earn from which income could be imputed. The court erred by holding that plaintiff's refusal to collect early social security benefits in and of itself constituted the unexercised ability to earn. The trial court needed to make findings as to why plaintiff chose to not continue with his election for social security retirement benefits to determine whether plaintiff has an unexercised ability to earn income from which income could be imputed.

3. Retroactive increases and decreases in child support payments are prohibited, but they are allowed for the period during

which there is a pending petition for modification commencing from the date that notice of the petition was given to the payer or recipient of support. MCL 552.603(2). Because the proof of service indicates that plaintiff did not receive notice of defendant's petition to modify child support until July 7, 2010, if the trial court orders plaintiff on remand to pay child support, any order may only be retroactive to that date of notice. The court erred by making the original award now on appeal retroactive to June 15, 2010, the date on which defendant filed the petition.

4. A trial court has authority to modify a child support order regarding the federal dependency tax exemption because it is considered part of the child support award. Under MCL 552.17(1), a trial court may modify a child support order upon a showing by the petitioning party that there has been a change in circumstances sufficient to justify the modification. The trial court did not clearly err by finding that the parties' child support order in which they alternated claiming the yearly federal dependency tax exemption was premised on the understanding that he would spend one day more than half time with defendant in odd numbered years and plaintiff in even numbered years. The trial court did not abuse its discretion by modifying the child support order and awarding the federal dependency exemption allocation to defendant. The parties' son exclusively resided with defendant from January 2010, which constituted a change in circumstances sufficient to modify the exemption allocation and award it to defendant.

Affirmed in part, reversed in part, and remanded for further proceedings.

1. PARENT AND CHILD — CHILD SUPPORT — IMPUTED INCOME — SOCIAL SECURITY RETIREMENT BENEFITS — MICHIGAN CHILD SUPPORT FORMULA.

When calculating child support obligations, under the Michigan Child Support Formula (MCSF), potential income may be imputed to a parent when he or she is voluntarily unemployed or underemployed or has an unexercised ability to earn income; applying the factors set forth in 2008 MCSF 2.01(G)(2), the trial court must determine whether the parent has an actual ability to earn and reasonable likelihood of earning the potential income before imputing the income and the court's decision must be supported by adequate fact-finding; when the evidence establishes that a parent has declined to receive early social security retirement benefits in order to receive a higher benefit at a later time, that parent has not demonstrated an unexercised ability to earn from which income could be imputed.

2. PARENT AND CHILD — CHILD SUPPORT — MODIFICATION OF CHILD SUPPORT ORDERS — RETROACTIVE.

Retroactive increases and decreases in child support payments are prohibited, but they are allowed for the period during which there is a pending petition for modification commencing from the date that notice of the petition was given to the payer or recipient of support (MCL 552.603[2]).

3. PARENT AND CHILD — CHILD SUPPORT — MODIFICATION OF CHILD SUPPORT ORDER — FEDERAL DEPENDENCY TAX EXEMPTIONS.

A trial court has authority to modify a child support order regarding the federal dependency tax exemption because it is considered part of the child support award; a child support order may be modified upon a showing by the petitioning party that there has been a change in circumstances sufficient to justify the modification.

Laurie S. Longo for Edwin R. Clarke, III.

Cynthia A. Clarke *in propria persona*.

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

MURRAY, J. Plaintiff, Edwin R. Clarke, III, appeals by leave granted a child support order imputing income to him and awarding child support to defendant, Cynthia A. Clarke. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

Plaintiff and defendant married in 1992 and had one son, Edwin R. Clarke, IV, who was born in 1994. A consent judgment of divorce, which adopted the terms of the parties' settlement agreement, was entered on June 28, 2007. According to the judgment, plaintiff and defendant were to share joint physical and legal custody of Edwin. No child support was awarded to either parent, but the judgment stated that child support may be awarded in the future if

> (a) [there is] a substantial court-ordered departure from equal parenting time or (b) a catastrophic change in income, where "catastrophic change in income" means that a party becomes physically or mentally disabled and is, therefore, unable to work, or a party is unemployed and is unable to find comparable employment following 120 days of his or her best efforts to do so. If child support becomes payable due to a loss of employment, the Court will have the discretion to make child support retroactive from the date of the petition for child support to the date that there was a change of income due to loss of employment.

Plaintiff lost his job on October 15, 2007, and on April 14, 2008, he moved for a change of physical custody and for the payment of child support. The trial court denied plaintiff's motion for a change in physical custody. But the trial court also found a catastrophic change in income and ordered defendant to pay plaintiff $485 a month in child support. Defendant disputed the child support award, and it was ultimately modified to $300 a month in November 2008.

In January 2010, plaintiff and Edwin had a disagreement. Afterwards, plaintiff asked defendant if Edwin could return to her home earlier than provided for in the parenting-time schedule. Defendant agreed and Edwin has been exclusively residing with defendant ever since. On June 15, 2010, defendant, in propria persona, petitioned for a change in child support. Defendant requested that the child support payment to plaintiff cease and that plaintiff be required to pay defendant child support.

Also during 2010, plaintiff, who was 64 years old, looked into the possibility of receiving social security retirement benefits. According to plaintiff's calculations, if he began receiving social security retirement benefits in 2010, he would have been entitled to $1,968 a month; however, if he waited until November 2012,

when he turns 66 years old, he would be entitled to $2,347 a month. Plaintiff also became aware that if he began receiving retirement benefits in 2010, Edwin would be entitled to receive dependent benefits of $1,173 each month until either his eighteenth birthday or his graduation from high school. Upon learning about this dependent benefit, plaintiff contacted defendant through a series of e-mails. In the e-mails, plaintiff attempted to negotiate an agreement with defendant to share in Edwin's dependent benefit. Specifically, plaintiff wanted defendant to confirm him as the representative recipient of Edwin's benefits and to agree to an allocation of benefits between the two households. Initially, plaintiff suggested defendant receive $200 a month from Edwin's entitlement, but later increased his offer to $400, and then to half, or $586.50.

In July 2010, plaintiff applied for and began receiving social security retirement benefits. Despite plaintiff's belief that the Social Security Administration (SSA) would hold the dependent benefit payment until he and defendant had reached an agreement, defendant began receiving Edwin's dependent benefit in July 2010. Social security benefits were received by plaintiff and Edwin from July 2010 through September 2010. When plaintiff discovered in September 2010 that Edwin's dependent benefit was being paid to defendant, he withdrew his social security application and repaid to the SSA all the monies received by himself and Edwin.

Subsequently, in December 2010, the friend of the court issued a child support recommendation that defendant's obligation to pay child support to plaintiff be terminated and that plaintiff's eligibility for social security retirement benefits be imputed as income in calculating child support. By imputing the social security retirement benefit to plaintiff, the friend of the

court recommended that plaintiff pay defendant $593.50 a month in child support. Plaintiff objected to the friend of the court recommendation, arguing that only distributed income from the SSA could be used in the calculation of income. Defendant urged the trial court to follow the friend of the court recommendation by imputing the retirement benefits as income to plaintiff.

Based on the parties' written submissions, the trial court determined that it had the authority to impute plaintiff's social security benefits as income because it was income that he had the ability to earn but had voluntarily eliminated. The court ordered plaintiff to pay $578 a month in child support and discontinued defendant's child support obligation, with the child support adjustment effective retroactively to June 15, 2010. The order also granted defendant the federal dependency tax exemption for the 2010 tax year because Edwin had not spent a single night with plaintiff since their argument in January 2010.

After the trial court denied plaintiff's motion for reconsideration, plaintiff filed an application for leave to appeal, which we subsequently granted. *Clarke v Clarke*, unpublished order of the Court of Appeals, entered June 17, 2011 (Docket No. 303580).

II. ANALYSIS

A. IMPUTATION OF UNDISTRIBUTED SOCIAL SECURITY RETIREMENT BENEFITS

Plaintiff argues that under § 2.01(C)(3) of the Michigan Child Support Formula (MCSF) only distributed social security retirement benefits may be considered as income. Generally, child support orders, including orders modifying child support, are reviewed for an abuse

of discretion. *Malone v Malone*, 279 Mich App 280, 284; 761 NW2d 102 (2008). However, whether the trial court properly applied the MCSF presents a question of law that we review de novo. *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). On the other hand, factual findings underlying the trial court's decisions are reviewed for clear error. *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007).

MCL 552.519(3)(a)(*vi*) grants the State Court Administrative Office Friend of the Court Bureau the authority to develop a formula for establishing and modifying child support obligations. A trial court must use the formula established by the Friend of the Court Bureau when determining child support, and may deviate from the formula only if the formula would be unjust or inappropriate based on the facts of the case. The trial court must set forth in writing or on the record the reasons for the deviation. MCL 552.605(2); *Paulson v Paulson*, 254 Mich App 568, 572; 657 NW2d 559 (2002). Just as with a statute, courts must comply with the plain language of the MCSF, and may not read language into the MCSF that is not present. *Peterson v Peterson*, 272 Mich App 511, 518; 727 NW2d 393 (2006).

Under the MCSF, the stated objective for determining a parent's income is to "establish, as accurately as possible, how much money a parent should have available for support." 2008 MCSF 2.01(B). With respect to imputation of income, one of the primary goals of the MCSF is to ensure that "[t]he amount of potential income imputed should be sufficient to bring that parent's income up to the level it would have been if the parent had not voluntarily reduced or waived income." 2008 MCSF 2.01(G)(1). Income is defined to include many items, but relevant to social security benefits, it is defined as:

> *Distributed* profits or *payments from* profit-sharing, a pension or retirement, an insurance contract, an annuity, trust fund, deferred compensation, retirement account, *social security*, unemployment compensation, supplemental unemployment benefits, disability insurance or benefits, or worker's compensation. [2008 MCSF 2.01(C)(3) (emphasis added).]

Plaintiff argues that his social security retirement benefits may not be included as income unless he actually receives payments from the SSA. That much is true. Black's Law Dictionary (9th ed) defines "payment" as the "[p]erformance of an obligation by the delivery of money . . . ." Hence, based on the plain meaning of "payment," it is clear that only the retirement benefits that are actually paid from the SSA and delivered to the recipient may be considered part of a parent's income for purposes of calculating child support under the MCSF. Here, plaintiff was not receiving social security payments from the SSA at the time the trial court decided the motion. The evidence instead shows that plaintiff chose not to continue to receive his social security retirement benefits either because he determined that the dependent benefits were not coming to him, or because he re-determined the economic value of receiving the benefits early. Either way, plaintiff was not receiving payments from the SSA, and therefore these yet-to-be-paid benefits cannot be deemed income under § 2.01(C).

That only paid social security retirement benefits may be considered income does not, however, address the dispositive issue, which is whether plaintiff's social security retirement benefits are potential income that may be imputed to him. According to the MCSF, under the following circumstances "income" can include income not actually earned:

> [w]hen a parent is *voluntarily unemployed or underemployed*, or has an *unexercised ability to earn*, *income* includes the *potential* income that parent could earn, subject to that parent's actual ability. [2008 MCSF 2.01(G) (emphasis added, final emphasis in the original).]

Accordingly, before imputation is permitted, the trial court must determine if the parent is voluntarily unemployed, underemployed, or has an unexercised ability to earn. *Stallworth*, 275 Mich App at 286-287. "[A] court's decision to impute income must be 'supported by adequate fact-finding that the parent has an actual ability and likelihood of earning the imputed income.' " *Carlson v Carlson*, 293 Mich App 203, 206; 809 NW2d 612 (2011), quoting *Stallworth*, 275 Mich App at 285.

The trial court utilized the following reasoning for imputing plaintiff's unrealized social security retirement benefits as income:

> Father [plaintiff] objects to the imputation of income. The referee imputes to Father Social Security benefits *that he is eligible for*. The parties argue that Father applied for Social Security. Received benefits for a short period of time, and then objected when the minor child's Social Security allotment went to Mother. *For whatever reason, Father has since withdrawn his request for Social Security Benefits and is no longer receiving same*.
>
> The Court has the authority to impute income to a party for purposes of calculating support. When a party eliminates income and the court concludes that the party has the ability to earn an income and pay child support, it is not error to order support based on the unexercised ability to earn. See *Ghidotti* [*v*] *Barber*, 459 Mich 189[;] 586 NW2d 883 (1998)[;] *Olson* [*v*] *Olson*, 189 Mich App [620] 473 NW2d 772 (1991)[;] *Daniels* [*v*] *Daniels*, 165 Mich App 726[;] 418 NW[2]d 924 (1988)[;] *Rohloff* [*v*] *Rohloff*, 161 Mich App 766[;] 411 NW2d 484 (1987).
>
> Father's pleadings are clear that he has little to no income. "He has made many proposals and has had some

> engagements, but these have not been sufficient to cover his promotion, travel, telephone and required office supplies." "After doggedly pursuing openings for a couple of years that perfectly matched his background and experience, only to be passed over for a younger applicant[.]"
>
> In this instance, *it is appropriate to impute to Father his Social Security benefits as income he has voluntarily eliminated and has the ability to earn.* Father's recitation of the law is misapplied and/or misunderstood. Section II.D of the MCSF manual allows the Court to consider dependent benefits from Social Security for the purpose of making a child support determination. The 2007 [sic] Michigan Child Support Formula Manual section 2.01(I) specifically states that the Court will "attribute all social security retirement, survivor's, or disability program dependent benefits based on the earnings of a parent paid for the children-in-common with the other parent as the earning parent's income." Furthermore, the child support prognosticator takes into consideration the benefit to Father and the benefit to his minor child and apportions it accordingly. Father's arguments to not impute his Social Security benefits as income fails. [Emphasis added.]

Initially, we point out that the trial court erred by applying § 2.01(I) to impute income to plaintiff. As noted by the trial court, 2008 MCSF 2.01(I) instructs that a court should "[a]ttribute all social security retirement, survivor's, or disability program dependent benefits based on the earnings record of a parent *paid for* the children-in-common with the other parent as the earning parent's income." (Emphasis added.) This language is an instruction regarding which parent's income is affected for purposes of child support when certain benefits (including social security retirement benefits) are paid on behalf of the child-in-common, and has no application in determining whether *potential* income can be *imputed* to a parent. Instead, it is § 2.01(G) that provides the guidelines for determining and calculating the imputation of potential income.

As noted, before income may be imputed to a parent, the trial court must first find that the parent is voluntarily unemployed, underemployed, or has an unexercised ability to earn. In determining that imputation of income was appropriate, the trial court noted that "[f]ather's pleadings are clear that he has little to no income[,]" and that plaintiff's social security retirement benefits were "income he voluntarily eliminated and has the ability to earn." Thus, the trial court found that plaintiff had an unexercised ability to earn income by receiving the social security retirement benefits, but did not find that plaintiff's lack of income was a result of being underemployed or that he was voluntarily unemployed. *Stallworth*, 275 Mich App at 286-287.

Once the trial court determines that a parent is voluntarily unemployed, underemployed, or has an unexercised ability to earn, § 2.01(G)(2) instructs a court to "[u]se relevant factors both to determine whether the parent in question has an actual ability to earn and a reasonable likelihood of earning the potential income," which are:

> (a) Prior employment experience and history, including reasons for any termination or changes in employment.
>
> (b) Educational level and any special skills or training.
>
> (c) Physical and mental disabilities that may affect a parent's ability to obtain or maintain gainful employment.
>
> (d) Availability for work (exclude periods when a parent could not work or seek work, e.g., hospitalization, incarceration, debilitating illness, etc.).
>
> (e) Availability of opportunities to work in the local geographic area.
>
> (f) The prevailing wage rates in the local geographical area.
>
> (g) Diligence exercised in seeking appropriate employment.

(h) Evidence that the parent in question is able to earn the imputed income.

(i) Personal history, including present marital status and present means of support.

(j) The presence of the parties' children in the parent's home and its impact on that parent's earnings.

(k) Whether there has been a significant reduction in income compared to the period that preceded the filing of the initial complaint or the motion for modification. [2008 MCSF 2.01(G)(2).]

"These factors generally ensure that adequate fact-finding supports the conclusion that the parent to whom income is imputed has an actual ability and likelihood of earning the imputed income." *Berger v Berger*, 277 Mich App 700, 725-726; 747 NW2d 336 (2008). Here, there is nothing in the record or in the trial court's order to suggest that it considered any factor listed in § 2.01(G)(2) before it imputed income to plaintiff. Of course, because the trial court was only addressing plaintiff's refusal to continue receiving the payment of a statutorily determined benefit, as opposed to the typical imputation scenario of whether a parent could have earned income through some type of employment, most of the factors do not even come into play.

Nonetheless, we conclude that the trial court erred by holding that plaintiff's refusal to collect early social security retirement benefits in and of itself constituted the unexercised ability to earn. Instead, we hold that when the evidence establishes that a parent has declined to receive early social security retirement benefits in order to receive a higher benefit at a later time, the parent has not demonstrated an unexercised ability to earn.[1] The rationale of *Moore v Moore*, 242 Mich App

[1] The monthly distribution a person receives once they apply for social security retirement benefits depends on several factors, including the

652; 619 NW2d 723 (2000), supports our conclusion. In *Moore*, the defendant husband objected to the plaintiff wife's motion to increase alimony payments because the plaintiff had not exercised her ability to collect payments from the defendant's pension. Thus, the defendant argued that the potential pension benefits should be imputed as part of the plaintiff's income. The trial court refused to impute the potential pension income, and stated that it would not consider the pension benefits as income to either party until that party began receiving the pension benefits. *Id*. at 653-654. This Court held that whether the potential pension benefits could be imputed as income depended upon whether making an early election to receive benefits from the pension would result in a reduced benefit:

> In this case, in determining whether imputing income to plaintiff was appropriate, the court should have considered whether plaintiff could elect to draw her share of the pension now without any reduction in benefits. If this is the case, we believe that plaintiff would be voluntarily reducing her income. Under this situation, *Healy* [*v Healy*, 175 Mich App 187; 437 NW2d 355 (1989)] applies and the income should be imputed to plaintiff, if she did not receive the benefits currently. On the other hand, if by taking her share of the pension now she would receive a reduced amount, it is inappropriate to impute the pension benefits as income. *For plaintiff to defer election of pension benefits to a later date when the benefits would be larger should not be viewed as a voluntary reduction in income, but rather as a possibly prudent investment strategy*. [*Id*., at 655 (emphasis added).]

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person's age when applying for benefits, the person's full retirement age, how long the person worked, and how much the person earned. See 42 USC 401 *et seq*. However, an individual who elects to receive benefits before full retirement age will suffer a permanent reduction in benefits. 42 USC 402(q)(1).

We agree with the *Moore* Court's conclusion. If the evidence shows that a parent would receive the same social security benefit regardless of when he or she elected to receive the distributions, and absent some other compelling reason, then the decision to defer the payment may properly be characterized as a voluntary reduction in income. But if the evidence shows that a parent would receive a larger benefit if he or she decided to defer payment until a later time, and again absent any evidence suggesting a contrary motivation,[2] then such a decision could properly be characterized as a prudent investment strategy.

This case, however, is unusual for two reasons. First, plaintiff did not merely elect to receive his early benefits. Instead, he elected and received them and then changed his mind and returned all benefits several months later. Second, the trial court made no finding as to *why* plaintiff accepted and then declined his election, instead indicating that he did so "for whatever reason." Hence, this is not a simple case where the evidence points to a decision based solely on electing to forego early retirement benefits so that a larger monthly benefit can be recouped later. Instead, there is some evidence that defendant may have been motivated by another reason—defendant's receipt of the child's dependent benefit—for his change of heart,[3] even

[2] We recognize that the payor's motivation is not dispositive, and in most child support situations it is not relevant at all. But, we have previously stated that "a party's motivation in voluntarily reducing his or her income is an appropriate factor for the trial court to consider in determining a party's ability to pay." *Rohloff*, 161 Mich App at 775. Motivation may be relevant here only because of the e-mails between the parties and plaintiff's decision to revoke his election and return his benefits once he found out that defendant was receiving the dependent benefits.

[3] Even if this were the reason plaintiff made his decision, it could still be considered a prudent investment strategy given the short duration that the dependent benefits would be paid. The trial court is best-suited to decide this fact-based issue.

though the objective evidence shows that plaintiff's decision will result in him subsequently receiving a higher monthly distribution. Accordingly, we remand to the trial court to determine the reason(s) why plaintiff chose not to continue with his election, the answer to which will determine whether imputation of the social security retirement benefits as income should occur. If the trial court finds that plaintiff was motivated by an economically driven investment strategy, then it should conclude that plaintiff does not have the unexercised ability to earn income. For these reasons, we reverse the trial court's order imputing social security retirement benefits as income to plaintiff and remand for further proceedings.

B. RETROACTIVE MODIFICATION

Plaintiff asserts that he did not receive notice of defendant's June 15, 2010, petition to modify child support until July 7, 2010, and that the trial court erred by modifying the child support order retroactively to June 15, 2010. While MCL 552.603(2) prohibits both retroactive increases and decreases in child support payments, *Harvey v Harvey*, 237 Mich App 432, 437-438; 603 NW2d 302 (1999), the retroactive modification of a child support order is permitted for the period during which there is a pending petition for modification, commencing from the "date that notice of the petition was given to the payer or recipient of support," MCL 552.603(2). The decision whether to retroactively apply a modification is a matter within the trial court's discretion. *Varga v Varga*, 173 Mich App 411, 417; 434 NW2d 152 (1988). But equitable circumstances are not appropriate considerations when applying MCL 552.603(2) and a flexible interpretation of the statute is precluded. *Waple v Waple*, 179 Mich App 673, 677; 446 NW2d 536 (1989).

Here the lower court record shows that defendant filed her petition on June 15, 2010, but the proof of service for the hearing regarding the petition to modify child support is dated July 7, 2010. Thus, on remand, if the trial court orders plaintiff to pay child support it may only retroactively modify the child support order to the date that plaintiff received notice of defendant's petition pursuant to MCL 552.603(2), which was July 7, 2010.

C. ALLOCATION OF THE FEDERAL DEPENDENCY TAX EXEMPTION

Plaintiff also asserts that the trial court lacked the authority to award defendant the federal dependency tax exemption for Edwin. But as stated by this Court in *Fear v Rogers*, 207 Mich App 642, 646-647; 526 NW2d 197 (1994), the trial court has the authority to modify an order regarding the federal dependency tax exemption because it is considered part of the child support award. See *Frain v Frain*, 213 Mich App 509, 512; 540 NW2d 741 (1995) ("[I]t is within the authority of state courts in domestic relations matters to award the federal income tax dependency exemptions for the minor children."). According to MCL 552.17(1),[4] a child support order may be modified by the trial court "upon a showing by the petitioning party of a change in circumstances sufficient to justify [the] modification." *Aussie v Aussie*, 182 Mich App 454, 463; 452 NW2d 859 (1990); see also *Maier v*

[4] MCL 552.17(1) states:

> After entry of a judgment concerning annulment, divorce, or separate maintenance and on the petition of either parent, the court may revise and alter a judgment concerning the care, custody, maintenance, and support of some or all of the children, as the circumstances of the parents and the benefit of the children require.

Brablec, 125 Mich App 511, 513; 336 NW2d 39 (1983) ("A trial court has the statutory power to modify orders for child support upon a showing by the petitioning party of a change in circumstances sufficient to justify modification.") (quotation marks and citations omitted). "The party challenging the modification on appeal bears the burden of showing a clear abuse of discretion which convinces this Court that it would have reached a different result." *Aussie*, 182 Mich App at 463.

According to the divorce judgment, the parties agreed to alternate the yearly federal dependency tax exemption for Edwin:

> In the odd numbered years Edwin will spend one day more than half time with Defendant, and Defendant will be entitled to claim head of household filing status and to claim Edwin as a dependent. In the even numbered years Edwin will spend one day more than half time with Plaintiff, and Plaintiff will be entitled to claim head of household filing status and to claim Edwin as a dependent. Each party will execute any IRS documents necessary to effectuate this provision.

The trial court's finding that this agreement was premised upon the understanding that Edwin would "spend one day more than half time" with defendant in odd numbered years, and "one day more than half time" with plaintiff in even numbered years, was not clearly erroneous. Both parties acknowledge that since January 2010, Edwin has been exclusively residing with defendant. Thus, there was a change in circumstances sufficient to modify the exemption allocation, and accordingly, the trial court's decision to modify the order and award the federal dependency tax exemption for Edwin to defendant for the 2010 tax year was not an abuse of discretion.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

No costs, neither party having prevailed in full. MCR 7.219(A).

MARKEY, P.J., and SHAPIRO, J., concurred with MURRAY, J.

PEOPLE v NICHOLSON

Docket No. 306496. Submitted May 1, 2012, at Grand Rapids. Decided June 26, 2012, at 9:15 a.m.

James Rg Nicholson was charged in the 58th District Court, Kenneth D. Post, J., with possession of marijuana in violation of MCL 333.7403(2)(d) after he was discovered on May 1, 2011, by a police officer with approximately one ounce of marijuana while sitting in a passenger seat of a parked vehicle and was arrested. He sought dismissal of the charge on the basis that he had applied for a registry identification card to use marijuana for medical purposes more than 20 days before he was arrested and, although he had not received the card before his arrest, by virtue of MCL 333.26429(b), his registry identification card was to be deemed granted by that date. He did not have a copy of the application with him at the time of his arrest, and he claimed that the paperwork was located in his own vehicle parked at his residence. In the district court, defendant produced a copy of his application, dated February 16, 2011, and a registry identification card that was backdated to indicate an issuance date of March 18, 2011. The district court denied the motion to dismiss the charge on the basis that § 4 and § 8 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26424 and MCL 333.26428, respectively, did not protect two different classes of patients and, therefore, defendant was required to establish a doctor-patient relationship under § 4. Defendant sought leave to appeal the district court's ruling in the Ottawa Circuit Court. The circuit court, Jon A. Van Allsburg, J., denied leave to appeal, holding that § 4 required defendant to have a registry identification card in his possession at the time of the offense. Defendant sought leave to appeal in the Court of Appeals, alleging that the circuit court erred by interpreting § 4(a) to require actual possession of a registry identification card at the time of the offense. Defendant alleged that a qualifying patient may not be arrested or prosecuted for the medical use of marijuana as long as the patient has a registry identification card somewhere, and that the patient is not required to produce the card immediately or carry the card on his or her person in order to qualify for the immunity set forth

in § 4(a). The Court of Appeals granted defendant's application for leave to appeal.

The Court of Appeals *held*:

1. Sections 4 and 8 of the MMMA function independently. There is no mention of a physician-patient relationship in § 4. The district court erred by holding that defendant was required to establish a physician-patient relationship under § 4.

2. Section 4(a) provides that a defendant is immune from arrest, prosecution, or penalty if the defendant is a qualifying patient, who has been issued and possesses a registry identification card, and possesses less than 2.5 ounces of useable marijuana. The medical use of marijuana in accordance with the MMMA is an additional criterion for immunity under § 4(a). It is not disputed that defendant was a qualifying patient, had been issued the equivalent of a registry identification card, and possessed less than 2.5 ounces of marijuana.

3. The immunity from arrest, prosecution, or penalty set forth in § 4(a) is applicable separately under each circumstance. Whether a person is one who possesses a registry identification card so as to be immune from arrest is a separate question for the court from whether the person is immune from prosecution or from penalty, and the court must inquire whether the person possesses a registry identification card at the time of the arrest, prosecution, or penalty separately.

4. Section 4(a) uses the term "possesses" in the present tense and, therefore, requires a defendant to presently possess a registry identification card in order to qualify for immunity from arrest. Someone possesses a registry identification card, for purposes of immunity from arrest, only when the person's card is reasonably accessible at the location of that person's marijuana possession and use. Defendant's card was not reasonably accessible when he was requested to produce it, therefore, he was not entitled to immunity from arrest.

5. Defendant met the requirement of possessing a card at the time of his prosecution and, therefore, for purposes of the "possesses" requirement, is immune from prosecution. However, defendant must still establish that he was engaged in the medical use of marijuana in accordance with the MMMA at the time of his arrest in order to be immune from prosecution. Because this issue is not properly before the Court of Appeals and the factual record is not sufficient to resolve the issue, the case must be remanded for consideration of this issue.

Reversed and remanded.

CONTROLLED SUBSTANCES — MARIJUANA — MICHIGAN MEDICAL MARIHUANA ACT — IMMUNITY FROM ARREST, PROSECUTION, OR PENALTY — WORDS AND PHRASES — POSSESSES.

A qualifying patient who has been issued and possesses a registry identification card is immune from arrest, prosecution, or penalty under the provisions of the Michigan Medical Marihuana Act for the possession or use of marijuana where the patient possesses less than 2.5 ounces of usable marijuana and the patient's possession and use of the marijuana was the medical use of marijuana as defined in the act; the immunity from arrest, prosecution, or penalty is applicable separately under each circumstance, therefore, a person may fail to qualify for immunity from arrest but still be entitled to immunity from prosecution or penalty; the act's use of the term "possesses" requires the patient to presently possess a card in order to qualify for immunity; a patient possess a card for purposes of immunity from arrest only when the patient's card is reasonably accessible at the location of the patient's possession or use of marijuana, and a patient possesses a card for purposes of immunity from prosecution only when the card is reasonably accessible at the location of his or her prosecution (MCL 333.26423[e], [h], [i], and [j]; MCL 333.26424[a]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Ronald J. Frantz*, Prosecuting Attorney, and *Gregory J. Babbitt*, Chief Appeals Attorney, for the people.

Newburg Law, PLLC (by *Matthew R. Newburg* and *Eric W. Misterovich*), for defendant.

Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

HOEKSTRA, J. Defendant appeals by leave granted the circuit court order denying his application for leave to appeal the district court's denial of defendant's motion to dismiss a charge of possession of marijuana on the basis of immunity provided by the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*.[1] For

[1] Although the statutory provisions at issue refer to "marihuana," by convention this Court uses the more common spelling "marijuana" in its opinions.

the reasons stated in this opinion, we reverse and remand for proceedings consistent with this opinion.

Defendant was arrested on May 1, 2011, for possession of marijuana in violation of MCL 333.7403(2)(d). Before his arrest, defendant had been sitting in a passenger seat of a parked vehicle near the Grandville water treatment plant when the vehicle was approached by a police officer. Defendant had approximately one ounce of marijuana in his possession, and verbally informed the police officer that he was a medical marijuana patient. Defendant indicated that he had been approved for the medical use of marijuana, but that he had not yet received his registry identification card. Defendant claimed to have paperwork showing his approval for the use of marijuana for medical purposes, but the paperwork was in his own car that was parked at his residence. The police officer arrested defendant and he was subsequently charged with possession of marijuana in violation of MCL 333.7403(2)(d).[2]

In the district court, defendant moved for dismissal of the charge pursuant to § 4(a) of the MMMA, which provides, in pertinent part: "A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner . . . provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana . . . ." MCL 333.26424(a). Defendant argued that while he did not have the paperwork with him at the time of his arrest, he had applied for a registry identification card on February 16, 2011. Further, defendant maintained that although he had not received the actual card before the

[2] MCL 333.7403(2)(d) provides that a person shall not knowingly or intentionally possess a controlled substance, and that a person who possesses marijuana is guilty of a misdemeanor punishable by imprisonment for not more than one year or a fine of not more than $2,000, or both.

date of his arrest, by virtue of MCL 333.26429(b),[3] his application became his card on March 18, 2011. The record also indicates that a copy of defendant's application, dated February 16, 2011, and a registry identification card that was backdated to indicate an issuance date of March 18, 2011, were submitted to the district court. The district court denied defendant's motion to dismiss.[4]

Defendant then filed an application for leave to appeal the district court's ruling in the circuit court, which granted defendant's motion for immediate consideration, but denied the application in a written decision. The circuit court focused its analysis on the meaning of the term "possesses" as used in § 4. The circuit court determined:

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[3] MCL 333.26429(b) provides:

> If the department fails to issue a valid registry identification card in response to a valid application or renewal submitted pursuant to this act within 20 days of its submission, the registry identification card shall be deemed granted, and a copy of the registry identification application or renewal shall be deemed a valid registry identification card.

[4] In denying defendant's motion to dismiss, the district court indicated that § 4 and § 8 (MCL 333.26424 and MCL 333.26428) of the MMMA did not protect two different classes of patients, and that defendant was required to establish a doctor-patient relationship under § 4. The circuit court denied defendant's application for leave to appeal on different grounds. Nonetheless, we note that the district court erred by conflating § 4 and § 8. As this Court has plainly explained, "the MMMA provides two ways in which to show legal use of marijuana for medical purposes in accordance with the act. Individuals may either register and obtain a registry identification card under § 4 or remain unregistered and, if facing criminal prosecution, be forced to assert the affirmative defense in § 8." *People v Redden*, 290 Mich App 65, 81; 799 NW2d 184 (2010). Because § 4 functions independently of § 8, and there is no mention of a physician-patient relationship in § 4, the district court erred by holding that defendant must establish a physician-patient relationship under § 4. See *id.*

> For [defendant] to avail himself of the defense provided by section 4(a) of the act, he had to have an issued registry identification card *in his possession* at the time of the offense. However, he acknowledges in his motion that he handed the officer a baggy containing marijuana, and that he had applied for, but had not received, a medical marijuana card.

Accordingly, the circuit court denied defendant's application.

On appeal, defendant argues that the circuit court improperly added an "immediate possession" requirement to the statute. Defendant maintains that the immunity from arrest and prosecution provided in § 4(a) for "[a] qualifying patient who has been issued and possesses a registry identification card" extends to qualifying patients who have constructive possession of a registry identification card. Accordingly, defendant urges us to find that a qualifying patient may not be arrested or prosecuted for the medical use of marijuana as long as that patient has a registry identification card somewhere, and that a patient is not required to produce the card immediately or carry the card on his or her person in order to qualify for the immunity set forth in § 4(a).

We review a trial court's decision on a motion to dismiss charges against a defendant for an abuse of discretion. *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010). A trial court may be said to have abused its discretion only when its decision falls outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

We review de novo a trial court's interpretation of the MMMA. *People v Bylsma*, 294 Mich App 219, 226; 816 NW2d 426 (2011). "The MMMA was enacted as a result of an initiative adopted by the voters in the November

2008 election." *Id.* This Court explained the rules of construction that apply to the interpretation of an initiative law in *Redden*, 290 Mich App at 76-77:

> "The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). We presume that the meaning as plainly expressed in the statute is what was intended. *Id.* This Court must avoid a construction that would render any part of a statute surplusage or nugatory, and "[w]e must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme." *People v Williams*, 268 Mich App 416, 425; 707 NW2d 624 (2005).

It is illegal under the Public Health Code, MCL 333.1101 *et seq*., for a person to possess, use, manufacture, create, or deliver marijuana. *Michigan v McQueen*, 293 Mich App 644, 658; 811 NW2d 513 (2011); see also MCL 333.7401(2)(d); MCL 333.7403(2)(d); MCL 333.7404(2)(d). The MMMA permits the medical use of marijuana "to the extent that it is carried out in accordance with the provisions" of the MMMA. MCL 333.26427(a). The MMMA "sets forth very limited circumstances under which those involved with the use of marijuana may avoid criminal liability"; the MMMA did not repeal any drug laws. *Bylsma*, 294 Mich App at 227.

In this case, defendant moved for dismissal of his marijuana charge on the basis of the immunity provided in § 4(a) of the MMMA. Section 4(a) provides:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the

> qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. [MCL 333.26424(a).]

Accordingly, a defendant is immune from arrest, prosecution, or penalty pursuant to § 4(a) if he or she (1) is a qualifying patient, (2) who has been issued and possesses a registry identification card, and (3) possesses less than 2.5 ounces of usable marijuana. *Id.* Provided that a defendant satisfies these requirements, he or she is entitled to immunity under § 4(a) for the "medical use"[5] of marijuana in accordance with the MMMA. MCL 333.26424(a). Thus, medical use in accordance with the MMMA is an additional criterion for § 4(a) immunity.

It is not disputed that on the date of his arrest, defendant was a qualifying patient, had been issued the equivalent of a registry identification card pursuant to MCL 333.26429(b), and possessed less than 2.5 ounces of usable marijuana. What remains to be decided is whether, under the circumstances of this case, defendant can satisfy the statutory requirements that a user of marijuana for medical purposes be a person who "possesses a registry identification card" and was engaged in the medical use of marijuana in accordance with the MMMA.

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[5] " 'Medical use' means the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(e).

On appeal, defendant argues that the term "possesses" should be construed to include constructive possession, and that, accordingly, he satisfied the requirement because he had constructive possession of a registry identification card, which was in his automobile at his residence. The prosecution argues that defendant was required to have his registry identification card on his person in order to satisfy the "possesses" requirement. It is apparent from these arguments that both defendant and the prosecution presume that whether a defendant is a person who "possesses a registry identification card" *at the time of his or her arrest* is determinative regarding whether he or she meets the § 4(a) "possesses" requirement in order to be immune from not only arrest, but also prosecution or penalty.

However, contrary to the parties' position, we conclude that a person can fail to qualify for immunity from arrest pursuant to § 4(a), but still be entitled to immunity from prosecution or penalty. Therefore, courts must inquire whether a person "possesses a registry identification card" at the time of arrest, prosecution, or penalty separately. We base this conclusion on the ordinary and customary meaning of the words, as they would have been understood by the voters, and we presume that the meaning plainly expressed by the words used in the statute is what was intended. *Redden*, 290 Mich App at 76.

The statutory section at issue in this case specifically provides, in pertinent part, that "[a] qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, *or* penalty in any manner[.]" MCL 333.26424(a) (emphasis added). The word "or" is disjunctive and, accordingly, it indicates a choice between alternatives. *McQueen*, 293

Mich App at 671. Thus, the immunity from arrest, prosecution, or penalty set forth in § 4(a) is applicable separately under each circumstance. Accordingly, whether a person is one who possesses a registry identification card so as to be immune from arrest is a separate question from whether the person is immune from prosecution or penalty.

Further, regarding the "possesses" requirement, the statute uses the term "possesses" in the present tense. Thus, the language of the statute requires a defendant to presently possess his or her registry identification card in order to qualify for § 4(a) immunity from arrest. Consistent with the present tense language of the statute, we conclude that, for purposes of immunity from arrest, someone "possesses" a registry identification card only when the registry identification card is reasonably accessible at the location of that person's marijuana possession and use. For example, a registry identification card would be reasonably accessible at a person's location under circumstances where the person, who is in possession of marijuana in their house and is requested by a police officer to establish their claim of immunity by producing their registration identification card, does not have their card in their house but is able to comply by leaving the house and retrieving the card from a car that is parked in the driveway of the house.

In this case, the relevant facts show that the arresting officer discovered defendant in possession of marijuana when he was in a passenger seat in another individual's vehicle that was parked near the Grandville water treatment plant. The officer asked the driver of the vehicle about the marijuana, and the driver indicated that defendant, who sitting in a passenger seat in the vehicle, possessed the marijuana. Defendant

told the officer that he had "crotched" the marijuana and removed a small bag of marijuana from his groin region. At that point, defendant informed the officer that he was a medical marijuana patient, but that proof of this fact was located in his own vehicle, which was parked at his residence. Under these circumstances, we conclude that defendant's paperwork showing that he had been issued the equivalent of a registry identification card at the time the police officer found him to be in possession of marijuana was not reasonably accessible at the location where he was requested to produce it because he was in possession of marijuana in another individual's vehicle away from his residence where the paperwork for his card was located. Consequently, defendant was not a person who "possesses a registry identification card," and he was not entitled to immunity from arrest.[6]

We next address whether defendant is immune from prosecution. If defendant's registry identification card was reasonably accessible at the location of his prosecution, defendant would meet the "possesses" require-

[6] Defendant maintains that constructive possession of a registry identification card is sufficient to satisfy the statute's "possesses" requirement, and urges this Court to accept a definition of "possesses" that would require only dominion and control of a registry identification card. This argument is contrary to the plain language of the statute as we have interpreted it, and it is inconsistent with the clearly established law that permits police officers to arrest individuals who commit misdemeanor offenses in their presence. Construing § 4(a) to provide immunity to any person who merely makes the claim that they have a valid registry identification card, but is unable to display it, is unworkable because it would eviscerate the ability to enforce the prohibition against the unlawful possession of marijuana with respect to anyone who simply makes a representation of entitlement to immunity without any proof of that status. If only constructive possession of a registry identification card is required, police officers would have no ability to evaluate the legitimacy of a claim of immunity made by individuals in possession of marijuana.

ment for immunity pursuant to § 4(a) despite the fact that he was not entitled to immunity from arrest. Here, defendant's production of his registry identification card in the district court was sufficient. Accordingly, defendant met the statutory requirement of possessing a registry identification card at the time of his prosecution and therefore, for purposes of the "possesses" requirement defendant is immune from prosecution pursuant to § 4(a).

Our conclusion that defendant satisfied the "possesses" requirement in § 4(a) at the time of his prosecution does not conclusively resolve the issue regarding whether defendant is entitled to immunity from prosecution. Defendant still has one more hurdle to overcome to be entitled to § 4(a) immunity from prosecution; he must also establish that at the time of his arrest he was engaged in the medical use of marijuana in accordance with the MMMA. MCL 333.26424(a). Because this issue is not properly before us and the factual record is not sufficient for resolution of whether defendant was engaged in the medical use of marijuana in accordance with the MMMA, we remand for consideration of this issue.

In sum, we hold that defendant was not immune from arrest because his application paperwork for a registry identification card was not reasonably accessible at the location of his arrest. We further hold that because defendant did possess a registry identification card that had been issued before his arrest when being prosecuted, he is immune from prosecution unless evidence exists to show that his possession of marijuana at the time of his arrest was not in accordance with medical use as defined in the MMMA or otherwise not in accordance with the provisions of the MMMA.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

WHITBECK, P.J., and SAWYER, J., concurred with HOEKSTRA, J.

VAN ELSLANDER v THOMAS SEBOLD & ASSOCIATES, INC

Docket No. 301822. Submitted March 19, 2012, at Detroit. Decided June 28, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 871.

Archie A. Van Elslander filed an action in the Oakland Circuit Court against, Daniel S. and Mary Elizabeth Follis and others, asserting breach of contract, breach of warranty, negligence and silent fraud arising from the sale of a home to him by the Follises. The case evaluation in 2005 was in favor of plaintiff, who rejected it, and all defendants except for the Follises were dismissed. The subsequent jury trial resulted in a verdict also in plaintiff's favor. The Court of Appeals, SCHUETTE, P.J., and BORRELLO and GLEICHER, JJ., reversed and remanded for a new trial on limited issues in an unpublished opinion per curiam, issued December 2, 2008 (Docket Nos. 272396 and 274966). On remand, a verdict of no cause of action was entered in favor of defendants who then sought case evaluation sanctions, taxation of costs and other sanctions. The court, Daniel P. O'Brien, J., conducted an evidentiary hearing and awarded defendants $86,813.98 in taxable costs, and $689,262.50 in attorney fees. Plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 600.2405(6), attorney fees authorized by statute or court rule may be taxed and awarded as costs. MCR 2.403(O)(6) expressly authorizes the recovery of attorney fees and costs as case evaluation sanctions so that the burden of the litigation's actual costs is imposed on the party who insists on trial by rejecting a mediation award. Actual costs are those costs taxable in any civil action and a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by rejection of the case evaluation; there must be a causal nexus between the services performed by the attorney and the particular party's rejection of the case evaluation. Sanctions should be imposed on a rejecting party under MCR 2.403(O) on the basis of the ultimate verdict that the parties are left with after appellate review is complete. The trial court did not err by awarding costs and sanctions to defendants because there was a sufficient causal nexus between plaintiff's rejection of the case evaluation award before the first trial and the subsequent

proceedings that resulted in the case being remanded for a new trial and ultimately a no cause of action verdict. Although the first verdict was more favorable to plaintiff, that judgment was reversed on appeal and the second verdict of no cause of action was clearly more favorable to defendants.

2. The court's award of $86,773.98 in costs was consistent with the amount requested by defendants, not more than their request, as plaintiff asserted.

3. MCL 600.2164(1) authorizes a trial court to award expert witness fees as an element of taxable costs; an expert witness must testify regarding matters of opinion, not to the established facts or deductions of science or other specific facts. The court abused its discretion by awarding expert witness fees for testimony by Daniel Sebold and Doug Maddelein because their testimony established facts pertaining to the construction of the house at issue, not to matters of opinion. The costs associated with their testimony were therefore not taxable.

4. For purposes of taxation of costs, expert witnesses are not automatically entitled to compensation for all services rendered. They are properly compensated for court time, the time required to prepare for their testimony and their travel expenses. MCL 600.2405(1); MCL 600.2552(1); MCL 600.2552(5). However, expert witnesses may not be compensated for educating counsel about expert appraisals, strategy sessions, and analyzing the opposing party's position. Under MCR 2.302(B)(4)(c)(i), the trial court must direct the party obtaining deposition testimony from an expert to pay him or her a reasonable fee, unless a manifest injustice would result from the payment. If an expert witness's trial preparation requires the work of an assistant, that amount is taxable if the aid provided is directed to preparing the expert witness to express an opinion.

5. Defendants were properly allowed to tax the cost of Robert Melvin's court, preparation for court, and travel expenses for the first trial, but not the interest accrued that was caused by defendants' failure to pay the bill. The court did not abuse its discretion by finding it would be manifestly unjust to tax the cost of Delno Malzahn's deposition and deposition preparation time because it was necessitated by defendant's substitution of experts on the basis of unspecified communication problems. Remand was necessary for an evidentiary hearing to distinguish for both expert witnesses between hours attributable to taxable versus nontaxable costs.

6. Pursuant to MCL 600.2405(5), the reasonable costs of any bond required by law, including any stay of proceeding or appeal

bond may be taxed and awarded as costs. Further, as long as the opposing party has agreed to a letter of credit in lieu of a bond the costs of the letter of credit are fully taxable as reasonable. The costs associated with defendants' letter of credit were properly taxable because plaintiff stipulated to the letter of credit and the trial court entered an order regarding same. However, the costs associated with a loan to obtain security for defendants' appeal bond were not taxable because there is no statutory authority for awarding them.

7. MCL 600.2549 provides that reasonable and actual fees paid for depositions of witnesses filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used. Although the cost of trial transcripts constitutes a taxable cost in an appeal under MCL 600.2543(2) and MCR 7.219(F)(3), it is inappropriate to include the cost of transcripts prepared for an appeal as costs recoverable by the prevailing party in a civil action. The court abused its discretion by awarding the cost of certified copies of the transcripts from the first trial because even though they were also used in the second trial, they were originally prepared for purposes of the first appeal. The court abused its discretion by awarding the cost of deposition transcripts of Paul Medwig and Scott Bischoff from the first trial because while the video depositions were played at trial, neither the video recordings nor the deposition transcripts were filed in the clerk's office as required by MCL 600.2549 to be a taxable cost. Remand was necessary to determine whether the costs of the deposition preparation and testimony of Barry Krecow were taxable because the record was unclear whether he was designated as an expert.

8. Motion fees are taxable costs and the court did not abuse its discretion by awarding costs for this item; remand was necessary however to delineate which motion fees were sought and awarded as taxable costs.

9. Costs for service of trial subpoenas at the rate of $18 plus mileage are taxable costs, but the process server is only entitled to traveling fees for the service from the place where the court that issued or filed the process or paper is located to the place of service, not to exceed 75 miles each way. MCL 600.2555; MCL 600.2559(1)(g). The charges for service of process on Donn Vidosh and Larry Monigold were in excess of the statutory amount of $18 and remand was necessary to determine whether the mileage charges for these two witnesses and those associated with serving Paul Osterber were for the statutorily permissible 75 miles or less.

10. Subpoena fees are properly included as taxable costs, but only as they pertain to witnesses. MCL 600.2552(1) provides that a witness who attends any action or proceeding pending in a court of record shall be paid a witness fee of $12 for each day, or may be paid for his or her loss of working time but not more than $15 for each day. The subpoena fee for Donn Vidosh was properly taxed because he testified at trial, but not for Wally Kidd and Larry Monigold because there was no evidence that they had attended the trial. The court abused its discretion by awarding costs for subpoena fees associated with file copies as they are nontaxable.

11. Attorney fees incurred when responding to appeals and those that have already been recovered pursuant to a statute are not recoverable. Recovery of these costs is not meant to provide a form of economic relief to improve the financial lot of attorneys or produce windfalls for parties. A reasonable fee is a fee similar to that customarily charged in the locality for similar legal services, which may differ from the actual fee charged, or the highest rate the attorney might otherwise charge.

12. To determine what constitutes a reasonable attorney fee the court should first determine the fee customarily charged in the locality for similar legal services by using reliable surveys or other credible evidence of the legal market, multiplied by the reasonable number of hours expended in the case. Once that number is calculated the additional factors outlined in *Smith v Khouri*, 481 Mich 519 (2008) should be considered to determine if the fee should be adjusted up or down. The burden is on the fee applicant to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing. Excessive, redundant or otherwise unnecessary hours regardless of an attorney's skill, reputation or experience must be excluded when calculating what constitutes hours reasonably expended for an award of attorney fees.

13. The court erred by relying mainly on the statements and averments of defendants' attorneys to determine the rate of a reasonable attorney fee for those attorneys involved in the case. These statements were improperly self-serving rather than formed on the basis of objective data. While the court acknowledged considering survey testimony it placed greater weight on subjective testimony from interested persons over objective testimony that was available. The court abused its discretion by rejecting the

consideration of referral appreciation discounts, attractive rates to entice future business and familial relationship because they are factors in determining what constitutes a fee customarily charged in the locality for similar legal services. The court abused its discretion by awarding fees to defendants' attorneys that utilized a billing rate that exceeded their normal hourly rates and that were not calculated on the basis of market value. While fee enhancements are allowed, the award of fee enhancements in this case to certain of defendants' attorneys, on top of the excessive hourly rate allowed, constituted both overcompensation and double enhancement. Remand was necessary to determine the reasonableness of the time expenditures.

Affirmed in part, reversed in part, and remanded.

1. ATTORNEY FEES AND COSTS — CASE EVALUATION SANCTIONS — ACTUAL COSTS — PREVAILING PARTY AFTER APPEAL.

Under MCR 2.403(O)(6) attorney fees and actual costs may be awarded as case evaluation sanctions so that the burden of the litigation's actual costs is imposed on the party who insists on trial by rejecting a mediation award; actual costs are those costs taxable in any civil action and a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by rejection of the case evaluation; there must be a causal nexus between the services performed by the attorney and the particular party's rejection of the case evaluation; sanctions should be imposed on a rejecting party under MCR 2.403(O)(1) on the basis of the ultimate verdict that the parties are left with after appellate review is complete.

2. COSTS — EXPERT WITNESS FEES — OPINION TESTIMONY.

MCL 600.2164(1) authorizes a trial court to award expert witness fees as an element of taxable costs; an expert witness must testify regarding matters of opinion, not to the established facts or deductions of science or other specific facts; expert witnesses are not automatically compensated for all services rendered; they are properly compensated for court time, the time required to prepare for their testimony and their travel expenses; expert witnesses may not be compensated for educating counsel about expert appraisals, strategy sessions, or analyzing the opposing party's position; under MCR 2.302(B)(4)(c)(i), the trial court must direct the party obtaining deposition testimony from an expert to pay him or her a reasonable fee, unless a manifest injustice would result from the payment; if an expert witness's trial preparation requires the work of an assistant, that amount is taxable if the aid

provided is directed to preparing the expert witness to express an opinion (MCL 600.2405[1]; MCL 600.2552[1]; MCL 600.2552[5]).

3. ATTORNEY FEES — CALCULATION OF REASONABLE ATTORNEY FEES — ELEMENTS.

To determine what constitutes a reasonable attorney fee the court should first determine the fee customarily charged in the locality for similar legal services by using reliable surveys or other credible evidence of the legal market, multiplied by the reasonable number of hours expended in the case; once a reasonable fee is calculated the additional factors outlined in *Smith v Khouri*, 481 Mich 519 (2008) should be considered to determine if the fee should be adjusted up or down.

4. ATTORNEY FEES — REASONABLENESS OF HOURS BILLED — EVIDENTIARY HEARING.

If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing; excessive, redundant or otherwise unnecessary hours, regardless of an attorney's skill, reputation or experience, must be excluded when calculating what constitutes hours reasonably expended for purposes of an award of attorney fees.

Kolin & Associates, PLC (by *Marjorie L. Kolin*), for Archie A. Van Elslander.

Zausmer, Kaufman, August, Caldwell, & Tayler, PC (by *Mark J. Zausmer*), and *Daniel S. Follis* for Daniel S. and Mary Elizabeth Follis.

Before: O'CONNELL, P.J., and SAWYER and TALBOT, JJ.

TALBOT, J. Plaintiff, Archie A. Van Elslander, appeals the award of case evaluation sanctions comprised of attorney fees and costs totaling $776,076.48. We affirm in part, reverse in part and remand.

I. FACTUAL AND PROCEDURAL HISTORY

This case initially involved claims pertaining to breach of contract, breach of warranty, negligence and

silent fraud, arising from the sale of a home by defendants, Daniel and Mary Follis, to Van Elslander. As described in a previous appeal to this Court:

> Unit 6 is a six-bedroom, approximately 9,000-square-foot home on the shore of Lake Michigan, in Bay Harbor. The Follises contracted with TSA to construct Unit 6, most of which occurred in 1996 and 1997, as a vacation residence and potential retirement home. In 1998, plaintiff purchased Unit 6 from the Follises for $3 million. In July 2002, powerful storms swept across Lake Michigan, and a tremendous quantity of water entered Unit 6. Plaintiff subsequently discovered that the home had extensive water damage and widespread mold. Significant portions of the home ultimately were removed and rebuilt, at great expense, and this lawsuit followed.[1]

The parties engaged in a case evaluation on April 13, 2005. Van Elslander was awarded $173,500, which he rejected. During the pendency of the action, all the defendants, except for Daniel and Mary Follis, were dismissed and the first trial proceeded solely against them on Van Elslander's claim of $1.6 million in damages. A nine-day jury trial resulted in a special verdict that rejected Van Elslander's claim of silent fraud but found the Follises had breached their responsibility to repair and awarded Van Elslander $680,838.82 in damages. With costs the award to Van Elslander totaled $706,465.30. The Follises appealed, and this Court remanded for a new trial solely on the issue of whether they had breached the escrow schedule pertaining to a window well and any damages arising therefrom.

A second trial was conducted on this limited issue, resulting in a jury verdict of no cause of action in favor of the Follises. The judgment permitted the Follises to

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[1] *Van Elslander v Thomas Sebold & Assoc, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2008 (Docket Nos. 272396, 274966), p 2.

submit a motion for taxation of costs. Van Elslander filed several motions for reconsideration and appeals to this Court and the Michigan Supreme Court, which were all denied. The Follises sought case evaluation sanctions, taxation of costs and other sanctions. An evidentiary hearing was conducted after the Follises' sought reconsideration of the trial court's initial refusal to award sanctions. At the conclusion of a multi-day evidentiary hearing, the trial court awarded the Follises $86,813.98 in taxable costs, and attorney fees of $689,262.50 as sanctions pursuant to MCR 2.403(O), for a total award of $776,076.48. It is this subsequent award of sanctions that is the focus of this appeal.

II. STANDARD OF REVIEW

Our Supreme Court has delineated the applicable standard of review pertaining to the award of case evaluation sanctions, as follows:

> A trial court's decision whether to grant case-evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo. We review for an abuse of discretion a trial court's award of attorney fees and costs. An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes.[2]

This Court reviews for an abuse of discretion a trial court's ruling on a motion for costs pursuant to MCR 2.625.[3] "[W]hether a particular expense is taxable as a cost is a question of law[,]" which we review de novo.[4]

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[2] *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (citations omitted).

[3] *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 367; 737 NW2d 807 (2007).

[4] *Guerrero v Smith*, 280 Mich App 647, 670; 761 NW2d 723 (2008).

III. PROPRIETY OF CASE EVALUATION SANCTIONS

Van Elslander contends that the trial court erred by awarding case evaluation sanctions premised on the unique circumstances of this case. Van Elslander rejected the case evaluation award of $173,500. The first jury trial resulted in a special verdict and award of $680,838.82 in favor of Van Elslander. The Follises appealed. This Court reversed and remanded, instructing that a new trial be conducted to address only one, limited issue. The second jury trial resulted in a no cause of action verdict in favor of the Follises. Van Elslander contests the award of case evaluation sanctions, arguing that the single issue tried on remand following the appeal to this Court was not the same or comparable to the multiple issues originally submitted for case evaluation.

It is well recognized that

> Michigan follows the "American rule" with respect to the payment of attorney fees and costs. Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award. The American rule is codified at MCL 600.2405(6), which provides that among the items that may be taxed and awarded as costs are "[a]ny attorney fees authorized by statute or by court rule." The American rule stands in stark contrast to what is commonly referred to as the "English rule," whereby the losing party pays the prevailing party's costs absent an express exception. MCR 2.403(O)(6) exemplifies the American rule by expressly authorizing the recovery of attorney fees and costs as case evaluation sanctions.[5]

The underlying purpose for the exception permitting the grant of mediation sanctions is to shift or "impose

[5] *Haliw v City of Sterling Hts*, 471 Mich 700, 706-707; 691 NW2d 753 (2005) (citations omitted).

the burden of litigation costs upon the party who insists upon trial by rejecting a mediation award."[6] This is consistent with the intent behind requiring litigants to engage in case evaluation in an effort "to encourage settlement and deter protracted litigation."[7]

Because the sanctions awarded in this matter are governed by MCR 2.403(O), we follow our Supreme Court's admonition:

> When called upon to interpret and apply a court rule, this Court applies the principles that govern statutory interpretation. Accordingly, this Court begins with the language of the court rule.[8]

MCR 2.403 (O)(1), the court rule that applies to a "[r]ejecting party's liability for [c]osts" following case evaluation, provides in relevant part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation.[9]

"Actual costs" are defined within the court rule as comprising "(a) those costs taxable in any civil action, and (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation."[10]

Courts have interpreted MCR 2.403(O) to be "trial-oriented."[11] "[U]nder MCR 2.403(O), a rejecting plain-

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[6] *Keiser v Allstate Ins Co*, 195 Mich App 369, 372; 491 NW2d 581 (1992).

[7] *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 32; 666 NW2d 310 (2003) (quotation marks and citations omitted).

[8] *Haliw*, 471 Mich at 704-705 (citations omitted).

[9] We note that this rule was amended in 2011 with an effective date of May 1, 2012.

[10] MCR 2.403(O)(6)(a) and (b).

[11] *Haliw*, 471 Mich at 708.

tiff who is liable for a defendant's attorney fees is only liable for those fees that accrued after the case evaluation as a consequence of defending against the rejecting plaintiff's theories of liability and damage claims."[12] A potential award is limited because the rejecting party is "only [] liable for those attorney fees directly flowing from [his or] her rejection of the case evaluation—those that accrued after the rejection and which were caused by defendant having to defend against plaintiff's theory of liability and damage claim."[13] Specifically, "a causal nexus [must] be established between the services performed by the attorney and the particular party's rejection of the case evaluation."[14]

Van Elslander rejected the case evaluation necessitating the first trial. Although the outcome of the first trial was sufficiently favorable to Van Elslander to preclude an award of sanctions for rejection of the case evaluation, that holding was appealed and this Court determined error necessitating reversal of the jury's verdict and remanded the matter to the trial court to conduct a second trial on a limited issue. There can be no reasonable dispute that the outcome of the second trial, which resulted in a jury verdict of no cause of action, was more favorable to the Follises, meeting the threshold criteria of the court rule.[15]

Van Elslander contends that because the issues varied significantly between the two trials and the intervening appeal, the case evaluation award did not constitute a proper basis for comparison. Effectively, Van

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[12] *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 529; 664 NW2d 263 (2003).

[13] *Id*. at 528.

[14] *Id*. at 526.

[15] MCR 2.403(O)(3), indicates that a "verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation. . . ."

Elslander asserts that the favorable outcome he obtained at the conclusion of the first trial should preclude an award of fees and costs incurred for that proceeding. Such an outcome, however, would be contrary to and serve to "frustrate" the court rule's stated "purpose of imposing the burden of litigation costs on the party that rejects the mediation evaluation and elects to go to trial by allowing him to escape sanctions and burden defendant because of an error of law . . . of the trial court."[16] This Court has repeatedly ruled that "it is the ultimate verdict that the parties are left with after appellate review is complete that should be measured against the mediation evaluation to determine whether sanctions should be imposed on a rejecting party pursuant to MCR 2.403(O)."[17] In analyzing circumstances similar to those presented in this case, other panels of this Court have found that the "fees generated in connection with both trials were 'necessitated by the rejection' of the mediation evaluation because they arose after the rejection."[18] This interpretation of the court rule has been deemed "harmonious with its purpose, which is to impose the burden of litigation costs upon the rejecting party[,]" as "[t]he cost of two trials was part of the risk assumed . . . when [he or she] rejected the mediation evaluation."[19]

Because there existed a sufficient causal nexus between Van Elslander's rejection of the case evaluation award and the subsequent proceedings, the trial court did not err by determining the award of costs and

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[16] *Keiser*, 195 Mich App at 374.

[17] *Id*. at 374-375.

[18] *Severn v Sperry Corp*, 212 Mich App 406, 417; 538 NW2d 50 (1995); quoting without citation MCR 2.403(O).

[19] *Id*.

sanctions to be appropriate. We do, however, find problematic the amount of costs and fees actually awarded.

IV. TAXABLE COSTS

Van Elslander also challenges the award of $86,813.98 in taxable costs by the trial court. "Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action."[20] "The power to tax costs is purely statutory, and the prevailing party cannot recover such expenses absent statutory authority."[21] As previously discussed by this Court, "[t]he starting presumption in all civil cases is:"

> "[C]osts shall be allowed as a matter of course to the prevailing party. *This does not mean, of course, that every expense incurred by the prevailing party in connection with the proceeding may be recovered against the opposing party*. The term 'costs' as used [in] MCR 2.625(A) takes its content from the statutory provisions defining what items are taxable as costs."[22]

As the prevailing parties, the Follises sought to tax costs for the following expenses: (a) fees for various expert witnesses for services rendered, (b) costs of an appeal bond and the loan of funds as security for the bond, (c) costs for certified copies of transcripts from the first trial, (d) costs for preparation of certain deposition transcripts, (e) costs for deposition preparation and testimony of a witness, (f) fees for motions that did not result in disposition of the claim, and (g) fees for the service of trial subpoenas and other miscellaneous subpoena fees.

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[20] MCR 2.625(A)(1).

[21] *Guerrero*, 280 Mich App at 670.

[22] *Id*. at 671 (citations omitted).

Initially, Van Elslander challenges the award of $86,813.98 in costs as constituting greater than 100 percent of the taxable costs sought by the Follises. A review of the record demonstrates that the Follises' initially requested $86,773.98 in taxable costs when seeking case evaluation sanctions. But when the Follises submitted the document entitled "Total Sanctions Sought" during the evidentiary hearing, the amount set forth was $86,813.98. Thus, contrary to Van Elslander's assertion, the amount awarded by the trial court was consistent with the amount requested by the Follises.

Van Elslander next asserts error by the trial court in awarding taxable costs for witnesses Daniel Sebold and Doug Maddelein because of the failure to designate them as expert witnesses. Although there is statutory authority for "a trial court to award expert witness fees as an element of taxable costs,"[23] there is no commensurate statutory authority authorizing the fees of lay witnesses. Specifically, the relevant statutory provision is applicable to "witnesses testifying to matters of opinion" and not "to witnesses testifying to the established facts, or deductions of science, nor to any other specific facts."[24] This Court has previously determined that the statutory provision is "expressly inapplicable" when a witness is not called to testify to matters of opinion.[25]

Our review of the record reveals that both Sebold and Maddelein were not designated as expert witnesses and were called to testify to establish facts pertaining to the construction of the house at issue. Although in the course of the testimony, their opinions on a few matters

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[23] *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 466; 633 NW2d 418 (2001), citing MCL 600.2164(1).

[24] MCL 600.2164(3).

[25] *Guerrero*, 280 Mich App at 672.

were elicited, they were not "witnesses testifying to matters of opinion[,]" and the costs associated with procuring their testimony are not properly taxable.[26] It was therefore an abuse of discretion on the part of the trial court to award these items as taxable costs. Remand is necessary for the deduction of $3,327.34 from the taxable costs awarded pertaining to these two individuals.[27]

Van Elslander also challenges the trial court's award of the full amount of taxable costs of $12,872.71 for Robert Melvin in the first trial and $25,488.50 for Delno Malzahn in the second trial. Van Elslander argues that Melvin's invoices fail to detail the services performed with the requisite specificity and challenges the award of costs for time spent in court, for review, travel and conferences, and any interest assigned. "[A]n expert is not automatically entitled to compensation for all services rendered."[28] " '[C]onferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position [are not regarded as] properly compensable as expert witness fees.' "[29] "Experts are properly compensated for court time and the time required to prepare for their testimony."[30] In addition, "the traveling expenses of witnesses may be taxed as costs, MCL 600.2405(1); MCL 600.2552(1); MCL 600.2552(5)[.]"[31]

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[26] *Id*., quoting MCL 600.2164(3).

[27] *Ivezaj*, 275 Mich App at 367.

[28] *Hartland Twp v Kucykowicz*, 189 Mich App 591, 599; 474 NW2d 306 (1991).

[29] *Id*., quoting *Detroit v Lufran Co*, 159 Mich App 62, 67; 406 NW2d 235 (1987).

[30] *Hartland Twp*, 189 Mich App at 599.

[31] *Guerrero*, 280 Mich App at 673.

Costs are taxable for Melvin's court and preparation time in addition to his travel expenses.[32] The record is, however, unclear whether the costs for Melvin's meeting and conference time were taxable due to the lack of specificity of the billing. The billing fails to indicate whether the time alleged was attributable to trial preparation, which would be taxable, or to "purposes such as educating counsel," which is non-taxable.[33] Further, Melvin's bill groups together "Court & Meet" and "Court & Conf[e]rence." Consequently, we are unable to discern the actual hours expended for taxable costs of court time from that attributable to conference and meeting time, which would not necessarily be a taxable cost. There is also no justification for the award of interest incurred due to the Follises' failure to pay the bill as a taxable cost. Remand is therefore necessary for an evidentiary hearing to further distinguish and recalculate those hours spent on taxable versus nontaxable costs.[34]

Van Elslander contends that the invoices supplied by the Follises demonstrate that the services performed by Malzahn were largely unrelated to preparing for and offering testimony at trial and should be excluded. Specifically, Van Elslander challenges the trial court's award of costs for Malzahn's learning or becoming familiar with the file, the research of technical issues, the preparation of affidavits and providing assistance to the Follises' unsuccessful attempt to preclude Van Elslander's expert environmentalist from testifying at

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[32] *Id*.

[33] *Hartland Twp*, 189 Mich App at 599, quoting *Lufran Co*, 159 Mich App at 67.

[34] See *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999) (holding that unless the record is sufficient a trial court should usually hold an evidentiary hearing when the opposing party challenges the reasonableness of a fee request).

trial. Van Elslander also takes issue with the award of deposition time and preparation, meetings with the clients and $3,925 attributable to the work of assistants.[35]

As previously discussed, although "[e]xperts are properly compensated for court time and the time required to prepare for their testimony,"[36] " 'conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position [are not regarded as] properly compensable as expert witness fees.' "[37] "MCR 2.302(B)(4)(c)(i) requires the trial court to direct the party obtaining deposition testimony from an expert to pay the expert a reasonable fee unless a manifest injustice would result from the payment."[38] If the preparation undertaken by an expert witness to testify requires the work of assistants, the labors of those assistants will be taxable if the aid provided is directed to preparing the expert witness to express an opinion.[39]

At the outset we note that the trial court determined, "it would be manifestly unjust under MCR 2.302(B)(4)(c)(i) to require [Van Elslander] to pay the deposition fee of [the Follises'] new expert, when the only reason given for the substitution was unspecified 'communication problems' with the original expert, and when the substitution has already caused [Van

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[35] We note that Van Elslander incorrectly identifies the amount of taxable costs attributed to Malzahn's assistants as our review of the bill indicates the total attributed to his assistants is $2,105.

[36] *Hartland Twp*, 189 Mich App at 599.

[37] *Id.*, quoting *Lufran*, 159 Mich App at 67.

[38] *Kernen v Homestead Dev Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002).

[39] See MCL 600.2164(3).

Elslander] to incur attorney fees and other expenses." Consequently, costs were not taxable for Malzahn's deposition time and deposition preparation time because these costs were specifically prohibited by the trial court as manifestly unjust in light of the expert witness substitution. Costs were taxable for Malzahn's court time and preparation time, including his learning the file and researching technical issues to the extent they were related to trial preparation.[40] Costs were not taxable for Malzahn's preparation of affidavits and assistance in the Follises' unsuccessful attempt to prevent Van Elslander's expert from testifying at trial as these costs were prohibited because they constituted " 'educating counsel about expert appraisals . . . and critical assessment of the opposing party's position[.]' "[41] It is unclear from the record if costs were taxable for client meetings because Malzahn's bill fails to indicate whether the purpose of the meetings was for trial preparation or for other nontaxable purposes.[42] It is also unclear whether costs were taxable for work attributable to assistants, because Malzahn's bill does not specify whether the time was spent preparing him to express an opinion or merely for assembling data. Because the time attributable to Malzahn's affidavit and deposition were nontaxable, time spent on assisting with these tasks or documents was also nontaxable. Further, we are unable to discern from the record before us whether the time spent on "research information" was to assist this witness in preparing to express an opinion or merely for data assembly. Similarly, it is unclear what activities encompassed the time characterized as "conflict & retention." Consequently, remand

[40] *Hartland Twp*, 189 Mich App at 599.

[41] *Id*. (citation omitted).

[42] *Id*.

is necessary for an evidentiary hearing to distinguish between hours attributable to taxable versus nontaxable costs and commensurate recalculation.

Van Elslander next argues that the trial court erred by awarding $26,860.62 for the cost of an appeal bond and $10,383 for the cost of the loan of funds for security for the bond. Specifically, he contends that the appeal bond was actually a letter of credit and that there is no legal basis to award the costs of security as taxable costs.

Statutory authority exists indicating, "[t]he reasonable costs of any bond required by law, including any stay of proceeding or appeal bond" may be taxed and awarded as costs.[43] This Court has held, "[w]here a party obtains a letter of credit in lieu of an appeal or stay bond, the costs of the letter of credit are fully taxable as 'reasonable,' as long as the opposing party has either agreed to the letter of credit in lieu of a bond[.]"[44] Because Van Elslander stipulated to the letter of credit and the trial court entered an order regarding it, these costs are fully taxable.[45]

Second, regarding the cost of a loan to obtain security for the appeal bond, neither party cites any authority to support that such cost is taxable. " '[C]osts are not recoverable where there is no statutory authority for awarding them.' "[46] Consequently, we find that the trial court abused its discretion by awarding this as an element of taxable costs.[47] Remand is required for

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[43] MCL 600.2405(5).

[44] *North Pointe Ins Co v Steward (On Remand)*, 265 Mich App 603, 612; 697 NW2d 173 (2005).

[45] *Id*.

[46] *LaVene v Winnebago Indus*, 266 Mich App 470, 473; 702 NW2d 652 (2005) (citation omitted).

[47] *Guerrero*, 280 Mich App at 674.

modification of the order by decreasing the amount of taxable costs by $10,383.[48]

Van Elslander next asserts that the trial court erred by awarding $3,555.95 for the cost of certified copies of the transcripts from the first trial, the cost of the deposition transcripts of Paul Medwig and Scott Bischoff, and the cost of the deposition preparation and testimony of Barry Krecow. Specifically, Van Elslander contends that the trial transcripts were not secured for use at the second trial but rather were required for the first appeal. He asserts that the testimony of Medwig and Bischoff was introduced by plaintiff at the first trial by video and that the transcripts were never used at trial. Van Elslander also argues that Krecow was never designated as an expert and that his testimony was not used at trial.

Statutory authority provides, "[r]easonable and actual fees paid for depositions of witnesses . . . filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used."[49] Although the cost of trial transcripts constitutes a taxable cost in an appeal,[50] it is inappropriate to include the cost of transcripts prepared for an appeal as costs recoverable by the prevailing party in a civil action.[51] It is evident from the bill, when viewed in conjunction with the date the transcripts were filed with the trial court and the date the claim of appeal was filed for the earlier appeal, that the subject transcripts

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[48] *Id*. at 674-675.

[49] MCL 600.2549.

[50] MCL 600.2543(2) and MCR 7.219(F)(3).

[51] See *DeWald v Isola (After Remand)*, 188 Mich App 697, 703; 470 NW2d 505 (1991).

were prepared for purposes of the appeal and are not a taxable cost.[52] Merely because the transcripts were also "necessarily used" in the second trial does not negate the fact that they were prepared for purposes of appeal. Because the trial court abused its discretion by awarding this as an element of the costs taxed in the case,[53] we remand for modification of the order taxing costs by decreasing the amount of taxable costs by $3,555.95.[54]

In evaluating the propriety of taxing the costs for the depositions of Medwig and Bischoff, the record reveals that the video depositions were played at trial. It does not however appear that the video recordings or deposition transcripts were filed in the clerk's office as required to be properly taxable.[55] Because the inclusion of these costs was an abuse of discretion, it is necessary to reduce the amount of taxable costs by $228.[56]

Van Elslander contends that costs for the Krecow deposition were improperly taxed because Krecow was never designated as an expert and his testimony was not used at trial. It is unclear from our review of the record whether Krecow was designated as an expert. If so, costs would be properly taxable absent manifest injustice.[57] If Krecow was not presented as an expert, the costs would be nontaxable because it does not appear that the Krecow deposition was filed with the court.[58] On remand, the trial court must initially determine whether Krecow was an expert and assign or recalculate costs accordingly.

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[52] *Id*.

[53] *Guerrero*, 280 Mich App at 674.

[54] *Id*. at 674-675.

[55] MCL 600.2549; see also *Guerrero*, 280 Mich App at 674; MCR 2.315(E) and (I).

[56] *Guerrero*, 280 Mich App at 674-675.

[57] *Kernen*, 252 Mich App at 692.

[58] MCL 600.2549.

Finally, Van Elslander argues that the trial court erred by awarding as taxable costs seven motion fees that did not result in disposition of the claim, fees for service of trial subpoenas and miscellaneous subpoena fees. Contrary to Van Elslander's arguments, the motion fees constitute taxable costs.[59] We note that the Follises attached support for 14 motions at a cost of $20 each. Yet, on the document submitted entitled Taxable Costs, the Follises only sought $140 or the cost of seven motions at $20 apiece. We are unable to discern from the record before us which seven motions the Follises sought as taxable costs and which seven motions Van Elslander is challenging on appeal. Remand is therefore necessary to delineate which motion fees were sought and awarded as taxable costs.

Costs for service of trial subpoenas are taxable costs. Statutory authority provides that "[a] person authorized by [the Revised Judicature Act of 1961, MCL 600.101 *et seq*.] or supreme court rule to serve process or a paper issued by or filed with a court in this state is only entitled to traveling fees for the service from the place where the court that issued or filed the process or paper is located to the place of service, not to exceed 75 miles each way."[60] "For a subpoena on discovery, for each person served, $18.00 plus mileage" is the "fee[] allowed for process or papers served out of a court in this state by a person authorized under [the Revised Judicature Act of 1961] or supreme court rule to serve process[.]"[61] The Follises attached as support for their request of $134.15 in taxable costs for service of trial subpoenas invoices for serving Donn Vidosh, Paul Os-

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[59] *Put v FKI Indus, Inc*, 222 Mich App 565, 573; 564 NW2d 184 (1997); MCL 600.2529(1)(e), (2).

[60] MCL 600.2555.

[61] MCL 600.2559(1)(g).

terberg, and Larry Monigold. It appears that for Vidosh and Monigold, the charges were in excess of the permissible statutory amount of $18. The record is unclear whether the mileage charges were for the statutorily permissible 75 miles or less because only a monetary amount rather than a mileage calculation was provided. Consequently remand is again necessitated to determine whether these costs are taxable.[62]

The subpoena fees are properly includable as taxable costs. "A witness who attends any action or proceeding pending in a court of record shall be paid a witness fee of $12.00 for each day . . . or may be paid for his or her loss of working time but not more than $15.00 for each day shall be taxable as costs as his or her witness fee."[63] The Follises attached support for subpoena fees of $12 for Wally Kidd, $15 for Donn Vidosh, $15 for Larry Monigold, and $20 for file copies. Based on the August 24, 2005, date of the check request for Kidd, it appears that the subpoena was for his deposition, which was read into the record at trial. Absent proof that Kidd "attend[ed]" trial, the cost of his subpoena is nontaxable.[64] Because Vidosh testified at trial the cost of his subpoena is taxable.[65] Monigold did not testify at trial. Absent the requisite proof that Monigold "attend[ed]" trial, the cost of his subpoena is nontaxable.[66] Finally, subpoena fees are taxable costs only as they pertain to witnesses.[67] Because the statute does not provide that costs are taxable for subpoenaing file copies any associated costs for this function are nontaxable. Because

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[62] *Guerrero*, 280 Mich App at 674-675.

[63] MCL 600.2552(1).

[64] *Id*.

[65] *Id*.

[66] *Id*.

[67] *Id*.

the trial court erred by awarding subpoena fees for Kidd and Monigold, in conjunction with the file copies as an element of the costs subject to taxation, remand is required to modify the order by decreasing the amount of taxable costs by $47.[68]

In summary, the trial court awarded all taxable costs requested by the Follises without adequate explanation. This constituted an abuse of discretion because some of the costs awarded were clearly nontaxable and other asserted costs required further inquiry to determine the propriety of their taxation.

V. ATTORNEY FEES

A. RELEVANT LAW

In awarding attorney fees as sanctions, this Court follows the strictures and guidelines provided by our Supreme Court in *Smith*.[69] The *Smith* Court, in discussing case evaluation sanctions available pursuant to MCR 2.403, noted that MCR 2.403(O)(6) defines "actual costs" recoverable as "those costs taxable in any civil action and 'a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.' "[70] Specifically excluded from consideration are "attorney fees incurred when responding to appeals" and attorney fees that "have already been recovered pursuant to a statute."[71]

The *Smith* Court cautioned that, while encouraging settlement between litigants, the

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[68] *Guerrero*, 280 Mich App at 674-675.

[69] *Smith*, 481 Mich 519.

[70] *Id*. at 527, quoting MCR 2.403(O)(6).

[71] *Id*. at 527 n 10.

> rule . . . is not designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls. Rather, it only permits an award of a *reasonable* fee, i.e., a fee similar to that customarily charged in the locality for similar legal services, which, of course, may differ from the *actual* fee charged or the highest rate the attorney might otherwise command.[72]

The Court noted that "reasonable fees are not equivalent to actual fees charged,"[73] and that "reasonable fees 'are different from the prices charged to well-to-do clients by the most noted lawyers and renowned firms in a region.' "[74]

In the effort to determine what constitutes a "reasonable fee," the *Smith* Court noted the methodology typically used by trial courts as a roadmap or blueprint for analysis. Initially, "the burden of proving the reasonableness of the requested fees rests with the party requesting them."[75] It is incumbent on the trial court "to consider the totality of special circumstances applicable to the case at hand."[76] Citing the factors elucidated in *Wood v Automobile Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982), the *Smith* Court identified six factors

> to be considered in determining a reasonable attorney fee:
>
> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.'[77]

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[72] *Id*. at 528.

[73] *Id*. at 528 n 12.

[74] *Id*. at 528.

[75] *Id*. at 528-529.

[76] *Id*. at 529.

[77] *Id*., quoting *Wood*, 413 Mich at 588.

The Court also recognized the following eight factors delineated in the Michigan Rules of Professional Conduct (MRPC) 1.5(a), noting an overlap with *Wood*:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent."[78]

The Court further recognized the value of data available in surveys such as the Economics of the Law Practice Surveys, as routinely compiled by the State Bar of Michigan.[79]

Determining that this multi-factor approach required "fine tuning," the Court delineated the following methodology for trial courts to conduct their analysis:

> We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of

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[78] *Id*. at 529-530.

[79] *Id*. at 530.

hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors.[80]

Providing further guidance, the Court stated:

The reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work. "The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question." We emphasize that "the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." The fees customarily charged in the locality for similar legal services can be established by testimony or empirical data found in surveys and other reliable reports. But we caution that the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality. Both the parties and the trial courts of this state should avail themselves of the most relevant available data. For example, as noted earlier, in this case defendant submitted an article from the Michigan Bar Journal regarding the economic status of attorneys in Michigan. By recognizing the importance of such data, we note that the State Bar of Michigan, as well as other private entities, can provide a valuable service by regularly publishing studies on the prevailing market rates for legal services in this state. We also note that the benefit of such

[80] *Id*. at 530-531.

> studies would be magnified by more specific data relevant to variations in locality, experience, and practice area.
>
> In considering the time and labor involved (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*) the court must determine the reasonable number of hours expended by each attorney. The fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness. The fee applicant bears the burden of supporting its claimed hours with evidentiary support. If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence.
>
> Multiplying the reasonable hourly rate by the reasonable hours billed will produce a baseline figure. After these two calculations, the court should consider the other factors and determine whether they support an increase or decrease in the base number."[81]

In the determination of "hours reasonably expended" the Court cautioned that " 'excessive, redundant or otherwise unnecessary' hours regardless of the attorneys' skill, reputation or experience" should be excluded.[82] The *Smith* Court also emphasized "that the goal of awarding attorney fees under MCR 2.403 is to reimburse a prevailing party for its 'reasonable' attorney fee; it is not intended to 'replicate exactly the fee an attorney could earn through a private fee arrangement with his client.' "[83] The Court did recognize the permissibility of "an upward adjustment for the truly exceptional lawyer."[84]

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[81] *Id*. at 531-533 (citations omitted).

[82] *Id*. at 532 n 17.

[83] *Id*. at 534.

[84] *Id*. at 535.

B. ANALYSIS

Our review of the trial court's opinion and order, in conjunction with the transcripts of the evidentiary hearing, when analyzed in light of *Smith*, reveals several concerns with the trial court's application of the strictures of *Smith* and its methodology in determining what constitutes a reasonable attorney fee and hours in conjunction with the ultimate award.

1. REASONABLE ATTORNEY FEE DETERMINATION

The trial court erred in its determination of what constituted a reasonable attorney fee, despite its alleged recognition and adherence to *Smith*. Specifically, the trial court failed to follow the admonition of the Court that in determining what constitutes a reasonable attorney fee that courts "should use reliable surveys or other credible evidence of the legal market."[85] As recognized in *Smith*, "[t]he fees customarily charged in the locality for similar legal services can be established by testimony or empirical data found in surveys and other reliable reports. But we caution that the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality."[86]

The trial court relied heavily and primarily on the statements and averments of the attorneys seeking the fees and sanctions. While this may constitute "empirical" data, we do not read *Smith* as suggesting such heavy reliance on subjective analysis. Rather, the emphasis of the Court was more on encouraging the use of formal surveys to establish market rate. In addition, the testimony of the individuals accepted by the trial court

[85] *Id*. at 530-531.

[86] *Id*. at 531-532.

was particularly self-serving making it questionable and more akin to "anecdotal statements" rather than objective data. While avoiding issues of credibility and weight,[87] we find it worth noting that defendants' expert, Norman Lippitt's opinion was subject to question given his free acknowledgement of familiarity with Zausmer's firm indicating "the principals of the law firm who I know very well . . . I have . . . thought enough of you to . . . represent us when we were sued on a commercial matter. . . . I played golf with you a couple of times." Lippitt's testimony was not particularly helpful or consistent with the strictures of *Smith*, as he opined a range of "reasonable" fees, indicating: $275 to $450 an hour for a partner, $175 to $250 an hour for an associate ($150 to $175 an hour for a paralegal and $90 to $135 an hour for a clerk). Lippitt further opined enhancements of $100 for a partner, $75 for an associate and $50 for a junior associate to be appropriate. Lippitt specifically indicated he gave no particular deference to the Bar Survey figures. While the trial court acknowledged considering testimony pertaining to "the Economics of Law Survey" it afforded greater weight to subjective testimony from clearly interested persons over objective data that was available.

In defining what constitutes a reasonable attorney fee, the *Smith* Court emphasized that a "reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work."[88] " 'The market rate is the rate that lawyers of similar ability and experience in the community normally charge their

[87] *Whitman v City of Burton*, 293 Mich App 220, 241; 810 NW2d 71 (2011) ("It is the fact-finder's responsibility to determine the credibility and weight of the testimony.")

[88] *Smith*, 481 Mich at 531.

paying clients for the type of work in question.' "[89] Consequently, the actual fee charged, while clearly not dispositive of what constitutes a reasonable fee, is a factor to be considered in determining market place value as it is reflective of competition within the community for business and typical fees demanded for similar work. The trial court specifically rejected any consideration of "referral appreciation discounts," "attractive rates to entice future business," and "familial relationships" as extraneous to a determination of what constitutes a reasonable fee. Yet such considerations are factors in determining what constitutes a "fee customarily charged in the locality for similar legal services." Such discounts are reflected in the rates charged by attorneys "of similar ability and experience in the community," and are reflective of what is "normally charge[d]" to paying clients.[90]

Zausmer testified that his retainer called for an hourly rate for a partner of $250 and $185 for an associate. Zausmer acknowledged that in charging this rate he was accommodating the referral source for this client and because the client was paying out of pocket and not through an insurer. Such behavior is not atypical and is representative of market value as it recognizes and helps to establish what constitutes a competitive fee within the local community. Zausmer asserted he normally would charge $395 an hour for complex litigation for his own fees and would bill for an associate at a rate of $200 to $250 an hour, alleging such rates were in line with the community and actually below what some attorneys might receive for similar work. In effect, Zausmer billed at a rate of $250 an hour, deemed $350 an hour reasonable and urged enhance-

[89] *Id*. (citation omitted).

[90] *Id*. at 530-531.

ment of his fee to $450 an hour due to his skill and expertise. Zausmer acknowledged that this case did not preclude him from accepting other litigation or work. The trial court determined that $350 an hour constituted a reasonable fee for Zausmer and further adjusted the rate upward providing an enhancement of $100 an hour for this attorney.

Similarly, his associate Cameron Getto was awarded $250 an hour as a "reasonable fee" with enhancement of $50 an hour, for an award of $300 an hour. Getto acknowledged that no client has ever paid him $250 an hour and that his normal fees ranged from $200 to $225 an hour and that he has accepted fees as low as $135 an hour. We find it reasonable to assume that Getto's normal fees are reflective of his market value in the legal community and competition for business.

Ernest Bazzana of Plunkett and Cooney provided appellate support and post-remand assistance. He was awarded as a reasonable fee $250 an hour and it is unclear whether he is included in the $50 an hour enhancement granted by the trial court for other senior associates. Despite agreeing to a retainer fee of $100 an hour, Bazzana was seeking $350 an hour for a reasonable fee despite acknowledging that his typical fee was $175 an hour and that he performed insurance work for $130 an hour. Bazzana admitted that he intentionally discounted his fee in this matter because he was hoping to secure future business from Compuware through defendants' son, Dan Follis, premised on his work in this case.

Only Van Elslander's expert, Michael Jacobs, discussed various surveys in determining a reasonable fee, which the trial court discounted. Jacobs is the only individual who recognized the distinction between what parties freely contract to pay and what would be rea-

sonable to require a third party to reimburse, suggesting that the goal is to make the person whole, consistent with the *Smith* Court's admonition that the pertinent court rule was "not designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls" and that a reasonable fee is one which is "customarily charged in the locality for similar services" and "may differ from the *actual* fee charged or the highest rate the attorney might otherwise command."[91]

The fee awarded to Dan Follis, Jr. presents its own category of problems. Dan Follis, Jr. is the son of Daniel and Mary Follis. He is an attorney and serves as general counsel at Compuware. He did not execute a retainer with his parents but provided liaison services and some legal expertise in this litigation. He admitted that he was not going to charge his parents for his services as he "would have done it anyway." Despite the intimate relationship and the lack of a retainer fee agreement, Follis was deemed to be entitled to $250 an hour as a reasonable rate of compensation for his services, indicating he was "qualified and served in a capacity here akin to Zausmer's firms' senior associates." In justifying its award of fees, the trial court asserted, "It is not an assessment on the reasonableness of hours expended by a son for his parents nor an assessment of the reasonableness of a rate for this attorney for work he normally performs," but rather was a reasonable rate "for *this* attorney for work on *this* file." Finding it appropriate to include time reportedly expended by Follis despite the absence of a retainer agreement or evidence of any billing for his services or remission of payment by the Follises for his work, the trial court based this part of the award on its determination that

[91] *Id*. at 528.

"[h]ad defendants not conceived their attorney son the record is persuasive that those hours spent would still have been necessary by an attorney of a status of or akin to Zausmer's firm's senior associates." It is unclear whether Follis's reasonable fee was also subject to enhancement.

It is difficult to justify the award as a sanction of fees for an individual who provided services that were agreed to be performed gratis. Such a result constitutes a windfall as it was not part of the billing to the Follises and, by definition, is something that goes beyond making the parties whole. The inclusion of fees for Follis borders on a punitive award, which is not the intent of the court rule and violates the *Smith* Court's admonition that the court rule "is not designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls."[92]

There exists an additional factor or standard of practice in the community that was either ignored or overlooked by the trial court pertaining to "blended fees." Getto acknowledged that his usual hourly rate is reduced when working simultaneously with an associate on a case. It can again be assumed that such a fee accommodation is not atypical and renders the attorney more competitive in seeking business by making the services more affordable, while offering the expertise or skill of an additional attorney. In this instance, all attorneys appear to have billed or sought higher fees despite the admission that multiple attorneys, of varying skill levels and experience, would work simultaneously on certain matters in this case. It would again be consistent to consider this as a factor in the determination of a reasonable fee, particularly in conjunction with concerns, which will be ad-

[92] *Id*. at 528.

dressed below, regarding a determination of reasonable hours expended in this matter.

2. REASONABLE HOURS

Unfortunately, the *Smith* Court failed to provide any substantive guidance regarding how to determine the reasonableness of hours claimed for work performed. In this instance, the trial court appears to have totally accepted the assertions of the Follises' counsel regarding the hours expended, specifically finding that there was no "no evidence besmirching" their testimony. The trial court rejected the methodology of comparison of hours expended by plaintiff's counsel as used by Van Elslander's proffered expert.

Getto asserted spending 100 hours in verifying the existence of an insurance payment to Van Elslander. Even the trial court questioned the necessity of so much time when a simple phone call or correspondence might reveal the necessary information, yet awarded the full time alleged. We also find it difficult to reconcile certain objective facts. Zausmer asserted the first trial was conducted over seven days, encompassed numerous issues, 300 exhibits and 20 witnesses. The associate involved in this portion of the proceedings billed 378.2 hours. Following remand, the second trial was approximately six days in length, addressed one issue and involved 10 to 12 witnesses, yet the different associate assigned to these proceedings billed 495.6 hours. In a similar vein, Bazzana, who was primarily a consultant post-remand, billed 57.9 hours premised on his commenting on the work of another attorney.

Zausmer acknowledged that at certain points multiple attorneys would be working simultaneously on the matter and reviewing each other's work. At one point, four individuals were billing on one matter. Yet Zaus-

mer indicated he assumed the vast majority of responsibility. He acknowledges having junior or less experienced associates contributing or reviewing his work. While we understand the desire to have other people review a legal document or product, this seems to be overkill and not a reasonable expenditure of time. While a supervisory or more experienced attorney may have oversight responsibilities, MRPC 5.1(b), it seems antithetical to have less experienced associates reviewing the senior or expert counsel's work at the level and frequency suggested herein. We would note that the *Smith* Court indicated that in determining the "hours reasonably expended" that " 'excessive, redundant, or otherwise unnecessary' hours regardless of the attorney's skill, reputation or experience" should be excluded.[93] Further, absent from the trial court's analysis is any indication that it reviewed the attorney fees claimed to be expended by the Follises "in order to prevent double payment for work if it was needlessly duplicated for the second trial."[94]

The trial court also impliedly appeared to accept allegations regarding the contentiousness of plaintiff, but did not appear to acknowledge admissions by the Follises' counsel that their clients were "incredibly demanding" and "not willing to cut corners." Arguably, this behavior led to increased hours as counsel for the Follises billed for more travel to conduct depositions rather than take them by telephone and for other services. This is pertinent to a determination of the reasonableness of the hours reportedly expended and billed. Finally, during the evidentiary hearing the parties appeared to only focus on the big picture and failed to address the details of the billings as there was little questioning or challenging of the amount

[93] *Id*., at 532 n 17 (citation omitted).

[94] *Severn*, 212 Mich App at 417.

of time billed for particular services. Consequently, we find it difficult to determine how reasonable the time expenditures were and remand to the trial court for further proceedings.

3. FEE ENHANCEMENTS

The trial court also awarded fee enhancements of $100 to Zausmer and $50 to certain levels of associates premised on its review of the factors elucidated in *Woods* and the MRPC. Our concern is whether the figures attained meet the spirit and intent of the *Smith* decision and do not serve both a punitive function and result in duplicative awards.

Smith focuses on what constitutes a reasonable fee and admittedly provides for enhancement depending on special circumstances. Yet *Smith* also requires a balancing by indicating that "reasonable fees 'are different from the prices charged to well-to-do clients by the most noted lawyers and renowned firms in a region.' "[95] We find that the award of enhanced fees in the circumstances of this case is directly contrary to the admonition by the *Smith* Court that the "goal of awarding attorney fees under MCR 2.403 is to reimburse a prevailing party for its 'reasonable' attorney fee; it is not intended to 'replicate exactly the fee an attorney could earn through a private fee arrangement with his client.' "[96]

In addition to an incorrect determination of what comprises a reasonable fee calculated on the basis of market value, the trial court proceeded to award the Follises' counsel fees in excess of their normal rate and also fee enhancements. The correct process would be to

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[95] *Smith*, 481 Mich at 528 (citation omitted).

[96] *Id*. at 534 (citation omitted).

determine a reasonable fee and then to adjust according to certain factors not to simply award the highest amount attainable or demanded by the best attorney in the community from a wealthy client. For example, Zausmer charged $250 an hour. The trial court awarded him a reasonable fee of $350 an hour and then enhanced it to $450 an hour. This results in both overcompensation and a double enhancement as it takes the billed fee, increases it to a reasonable fee, and then provides an additional enhancement to result in receipt of almost double the fees expected when effectuating the retainer with these clients. The result for attorneys, such as Getto, is similar. Getto acknowledged never receiving $250 an hour from clients, yet he was provided that amount plus an additional $50 enhancement.

While enhancement is permissible, the actions of the trial court failed to recognize the intent of the *Smith* Court to acknowledge special circumstances in which the increase of the reasonable fee is appropriate while counterbalancing it against the admonition that the court rule for sanctions is not intended or "designed to provide a form of economic relief to improve the financial lot of attorneys or to produce windfalls."[97]

VI. CONCLUSION

We affirm, in general, the trial court's award of case evaluation sanctions and taxable costs. We reverse the amount of attorney fees and taxable costs awarded and remand for further hearings consistent with this opinion. We do not retain jurisdiction.

O'CONNELL, P.J., and SAWYER, J., concurred with TALBOT, J.

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[97] *Id*. at 528.

In re FREY

Docket Nos. 307152 and 307154. Submitted June 13, 2012, at Detroit. Decided July 3, 2012, at 9:00 a.m.

The Department of Human Services (DHS) petitioned the Wayne Circuit Court, Family Division, for the termination of L. Frey's and C. Frey's parental rights to their minor child, P. L. Frey. The court, Mark T. Slavens, J., granted the petition on the basis of the grounds for termination in MCL 712A.19b(3)(c)(*i*) (conditions leading to adjudication continue to exist), (c)(*ii*) (other conditions supporting jurisdiction have not been rectified), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood of harm if returned to parental home). Respondents appealed.

The Court of Appeals *held*:

1. Termination of parental rights is appropriate when the DHS proves one or more grounds for termination under MCL 712A.19b(3) by clear and convincing evidence. The primary condition leading to adjudication in this matter was respondents' failure to resolve issues pertaining to respondent father's alcohol abuse and respondent mother's substance abuse. During the proceedings, issues also came to light concerning respondents' inability to provide adequate housing and financial support for the child, and respondents were involved in criminal activity. Under the circumstances, the trial court did not clearly err by determining that clear and convincing evidence existed for termination under the cited statutory grounds.

2. In a child protective proceeding, MCL 712A.19a(2) requires that reasonable efforts to reunite the child and family be made. If the respondents need accommodation in services, the time for requesting that accommodation is when the court adopts a service plan. In this case, respondents were ordered to participate in services, including drug screenings, and although they complied with many of the court's requirements, they repeatedly missed the drug screenings. Respondents asserted that the DHS had failed to accommodate their need for transportation services to ensure their compliance with the mandated drug screenings. However, they did not timely object or indicate that the services were inadequate and thus failed to preserve the issue. Regardless,

however, a caseworker had offered respondents bus tickets to facilitate their participation in drug screenings, but respondents refused the tickets because of the physical distance respondents lived from a bus stop. While the DHS had a responsibility to expend reasonable efforts to provide services to secure reunification, respondents had a commensurate responsibility to participate in the services that were offered. Respondents failed to either participate or demonstrate that they sufficiently benefited from the services provided. Consequently, the trial court properly found insufficient compliance and benefit, necessitating termination of respondents' parental rights.

3. If the trial court finds that there are grounds for termination of parental rights and under MCL 712A.19b(5) that termination of parental rights is in the child's best interests, the court must order termination of parental rights. The trial court did not clearly err by determining that termination of respondents' parental rights was in the best interests of the child given that the child had been in foster care or placed with relatives for 22 months, and the evidence showed that it was unlikely that the child could be returned to her parents' home within the foreseeable future.

Affirmed.

PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — REASONABLE EFFORTS TO REUNITE THE CHILD AND THE FAMILY — ACCOMMODATION IN SERVICES.

In a child protective proceeding, reasonable efforts to reunite the child and the family must be made; if the respondent needs accommodation in services, the time for requesting that accommodation is when the court adopts a service plan; failure to timely object or indicate that the services are inadequate results in the issue being unpreserved; while the Department of Human Services has a responsibility to expend reasonable efforts to provide services to secure reunification, the respondent has a commensurate responsibility to participate in the services that are offered (MCL 712A.19a[2]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Jonathan E. Duckworth*, Assistant Attorney General, for the Department of Human Services.

Wanda R. Cal for L. Frey.

Stacy M. Combs for C. Frey.

Janice H. Jones for the minor child.

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM. In these consolidated appeals, respondents contest the trial court order terminating their parental rights to the minor child under MCL 712A.19b(3)(c)(*i*) (conditions leading to adjudication continue to exist), (c)(*ii*) (other conditions supporting jurisdiction have not been rectified), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood of harm if returned to parental home). We affirm.

Respondents contend that the trial court's findings were clearly erroneous and that the Department of Human Services (DHS) failed to sustain its burden of proving the statutory grounds for termination. Termination of parental rights is appropriate when the DHS proves one or more grounds for termination by clear and convincing evidence. *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000); *In re B & J*, 279 Mich App 12, 17; 756 NW2d 234 (2008). It is only necessary for the DHS to establish by clear and convincing evidence the existence of one statutory ground to support the order for termination of parental rights. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000). We review the lower court's findings for clear error. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010); *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999).

The primary condition leading to the adjudication in this matter was respondents' failure to resolve issues pertaining to respondent father's alcohol abuse and respondent mother's substance abuse. Further, during the pendency of the proceedings, issues came to light

pertaining to respondents' inability to provide adequate housing and financial support for the minor child, and that respondents were involved in criminal activity. We conclude that the trial court did not clearly err by determining that clear and convincing evidence existed for termination under the cited statutory grounds.

The minor child was removed in December 2009, after respondents and the child were involved in an automobile accident. At the time of the accident, respondent father was determined to have a blood alcohol level of 0.24 grams per 100 milliliters of blood. While the exact cause of the accident is unknown, evidence indicated that respondent father was driving at a rate of 100 miles an hour and that respondent mother and the minor child were in the vehicle at the time of the accident. This accident resulted in respondent father's fifth drunk driving conviction since 2007. Respondent mother admitted having taken a narcotic immediately before the accident and being aware that respondent father was inebriated when she voluntarily entered the vehicle with the child.

Respondents made admissions and pleaded no contest to parts of the petition, leading to the child being made a temporary court ward in January 2010 with placement in the care of her maternal grandmother. A dispositional hearing was held in February 2010. At that time, respondents were ordered to participate in a parent-agency agreement (PAA) that required their involvement in individual therapy, parenting classes, visitation with the minor child, substance abuse assessments, and drug screens. Participation in substance abuse treatment also was mandated if the respondents' drug screens were positive. Respondents were also required to maintain contact with the caseworker, obtain suitable housing and income, and undergo psychological evaluations.

Our review of the record supports the trial court's determination that respondents failed to comply with or benefit sufficiently from their participation in services in accordance with the court-ordered treatment plans. After completing a 30-day inpatient substance abuse program, respondent mother experienced a relapse in her drug use. Respondent father was incarcerated from December 2009 to July 2010 for the drunk driving offense that necessitated placement of the child into foster care. Thereafter, both he and respondent mother missed numerous drug screens, which was a significant issue to the trial court because of respondents' substance abuse histories. Respondents were in partial compliance with their respective treatment plans given that they did visit the child regularly and were reported as being behaviorally appropriate during those interactions. Further, respondents attended counseling and parenting classes, and at one point the trial court pronounced them in "95 or 98 percent compliance" with the PAA except for their failure to regularly participate in the required drug screens.

At that time, the concern expressed by the trial court and the DHS with regard to respondents' failure to comply with the mandated drug screens was premised on verifiable incidents in respondents' history and proved to be prescient. In May 2011, respondent mother tested positive for cocaine. In July 2011, respondents were arrested for their involvement in a home invasion. Respondent mother admitted that she had participated in the home invasion in order to steal prescription drugs. She was placed on probation and required to complete a 90- to 120-day inpatient substance abuse program. Respondent father was reincarcerated in May 2011. At the time of the final hearing, neither parent was physically available to care for the child. During the pendency of these proceedings, respondent mother was

arrested three times on charges of retail fraud and home invasion. Respondent father was incarcerated for approximately 1/2 of the time this case remained open. In light of their histories, the trial court was legitimately concerned with the ability of respondents to remain clean, sober, and out of prison for sufficient blocks of time in order to be available to provide adequate care for their minor child.

Respondents further allege that the DHS failed to provide them adequate services in light of their problems securing transportation in order to participate in drug testing. Respondents contend that they lacked access to transportation, resulting in their inability to comply with court-ordered drug screens. Respondents do not dispute that the caseworker offered them bus tickets, but allege that they lived several miles from a bus stop. While it is true that, with limited exceptions, "reasonable efforts to reunify the child and family must be made in all cases," MCL 712A.19a(2), respondents failed to object or indicate that the services provided to them were somehow inadequate, thereby failing to preserve this issue. "The time for asserting the need for accommodation in services is when the court adopts a service plan . . . ." *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000).

Although respondents now contend that the DHS failed to accommodate their need for transportation services to ensure their compliance with mandated drug screenings, those allegations appear specious. Respondents alternatively asserted that they could not attend drug screenings because they lacked funds to fuel and insure their vehicle, they lived too far from a bus stop to obtain a ride to a drug screening facility, the license plate for their vehicle had expired, and they lacked bus tickets; respondent mother also merely asserted that

she was "unable to make it" to the screenings. Evidence was submitted that the caseworker offered respondents access to bus tickets to facilitate their participation in drug screens, but respondents refused the tickets because of the physical distance respondents lived from a bus stop. Yet when actually faced with termination of their parental rights, respondents indicated that they would walk to secure the screens and would accept the bus tickets. While the DHS has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered. In this instance, services were proffered, but respondents failed to either participate or demonstrate that they sufficiently benefited from the services provided. See *In re Gazella*, 264 Mich App 668, 676-677; 692 NW2d 708 (2005). While respondents were offered various services and did participate in and complete certain mandated requirements of their respective treatment plans, they failed to demonstrate sufficient compliance with or benefit from those services specifically targeted to address the primary basis for the adjudication in this matter—their historical problems with alcohol and substance abuse. Consequently, the trial court did not clearly err by finding insufficient compliance with and benefit from the services provided by the DHS, necessitating the termination of respondents' parental rights.

We also conclude the trial court did not clearly err by determining that termination of respondents' parental rights was in the best interests of the child. MCL 712A.19b(5); MCR 3.977(H)(3) and (K); *Trejo*, 462 Mich at 356-357; *In re Foster*, 285 Mich App 630, 633; 776 NW2d 415 (2009). The child was in foster care or placed with relatives for 22 months. While respondents did make some progress in addressing their issues, the

evidence showed that it was unlikely that the child could be returned to her parents' home within the foreseeable future, if at all. The child required a permanent, safe, and stable home, which neither respondent was capable of providing. Hence, the trial court did not clearly err by determining that termination of respondents' parental rights was in the child's best interests.

Affirmed.

MURRAY, P.J., and WHITBECK and RIORDAN, JJ., concurred.

In re TIEMANN

Docket Nos. 303813 and 306407. Submitted May 1, 2012, at Grand Rapids. Decided May 8, 2012. Approved for publication July 3, 2012, at 9:05 a.m. Leave to appeal denied, 493 Mich 958.

Cullen A. Tiemann, a 15-year-old male, entered a plea of nolo contendere in the Ionia Circuit Court, Family Division, to a charge of third-degree criminal sexual conduct involving a female victim between the ages of 13 and 16. He then sought to withdraw the plea on the basis that he allegedly had not known that he would have to register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., as a result of his plea. The court, Robert S. Sykes, Jr., J., denied the motion to withdraw the plea and entered an order of disposition, placing Tiemann on six months' probation to be served in his parents' home. Tiemann appealed the order of disposition (Docket No. 303813). The trial court then conducted a hearing, pursuant to MCL 28.723a, to determine whether Tiemann could establish that the 14-year-old victim had consented to the sexual conduct and therefore Tiemann would not be required to register under SORA. The court determined that Tiemann had failed to establish the victim's consent and therefore he was required to register under SORA. Tiemann appealed that holding (Docket No. 306407). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. There is no public policy bar to the prosecution of one child who engages in sexual conduct with another child when both children are within the same protected age group. Children are entitled to no less protection from other children who sexually abuse them than they are from adults who sexually abuse them.

2. MCL 750.520d is not ambiguous. Just because the violation of a law is prevalent does not mean that enforcement of the law is absurd.

3. A defendant is responsible for his or her illegal conduct, regardless of the defendant's duty to put law enforcement personnel and the public on notice of that illegal conduct. Therefore, it is not incompatible that SORA states in MCL 28.723 that a person convicted of a tier I, II, or III offense must

register and at MCL 28.722(w)(*iv*) that a tier III offense includes, among other violations, a violation of MCL 750.520d unless a court determines that the victim consented to the conduct constituting the violation, that the victim was at least 13 but less than 16 years of age, and the offender is not more than four years older than the victim. The statutes are not so incompatible that both cannot stand. There is no conflict if a defendant does not have to register under SORA after a finding that the victim consented but remains convicted of the conduct constituting the violation, for example, consensual statutory rape.

4. The term "person" as used in MCL 750.520d(1)(a) is not vague with respect to proscribing the conduct of a child between the ages of 13 and 16 when it comes to consensual sex with another child between the ages of 13 and 16. Because Tiemann is not making a First Amendment argument in this regard, the question is whether the statute is vague as applied to the conduct allegedly proscribed in this case. That it may be vague with respect to the conduct of a rape victim is not relevant consideration in this case.

5. Tiemann did not establish factual support for his equal protection argument that the charges were brought against him, but not against the victim, because of his gender. His aggressive behavior was more likely the basis for bringing the charges against him.

6. Because the effects of SORA do not implicate a liberty or property interest, the Due Process Clause did not require that additional due process guarantees be afforded Tiemann at the consent hearing conducted pursuant to MCL 28.723a.

7. SORA is not a criminal statute. Because it is a regulatory statute, a criminal prosecution is not at issue and the Confrontation Clauses of the United States Constitution and the Michigan Constitution do not apply to consent hearings conducted pursuant to MCL 28.723a.

Affirmed.

1. CRIMINAL LAW — CRIMINAL SEXUAL CONDUCT — JUVENILE OFFENDERS.

The purpose of the provision of the third-degree criminal sexual conduct statute prohibiting acts of sexual penetration with another person when that other person is at least 13 years of age and under 16 years of age is the protection of the minor victim; the age of the offender is not a relevant concern; there is no public policy bar to the prosecution of one child who engages in sexual conduct with another child when both are within the same protected age group (MCL 750.520d[1][a]).

2. STATUTES — ENFORCEMENT OF STATUTES — WIDESPREAD VIOLATIONS OF STATUTES.

The fact that the violation of a law is prevalent does not mean that enforcement of the law is absurd.

3. CONSTITUTIONAL LAW — STATUTES — VAGUE STATUTES.

The constitutionality of a statute must be examined in light of the particular facts at hand without concern for the hypothetical rights of others when a defendant's challenge of a statute as being impermissibly vague does not implicate First Amendment freedoms; the proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in the case.

4. CONSTITUTIONAL LAW — EQUAL PROTECTION — SELECTIVE CRIMINAL PROSECUTIONS.

Michigan has adopted a two-pronged test to determine whether a particular prosecution violates the Equal Protection Clause: first it must be shown that the defendants were singled out for prosecution while others similarly situated were not prosecuted for the same conduct, second, it must be established that the discriminatory selection in prosecution was based on an impermissible ground such as race, sex, religion, or the exercise of a fundamental right.

5. CRIMINAL LAW — CONSTITUTIONAL LAW — SEX OFFENDERS REGISTRATION ACT — DUE PROCESS — RIGHT TO CONFRONTATION.

The Sex Offenders Registration Act is regulatory and does not impose punishment; the act does not implicate a liberty or property interest and does not implicate due process rights; the act is not a criminal statute that concerns a criminal prosecution to which the Confrontation Clause applies (MCL 28.721 *et seq*.).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Ronald J. Schafer*, Prosecuting Attorney, and *Kyle B. Butler*, Assistant Prosecuting Attorney, for petitioner.

Foster & Harmon, P.C. (by *Richard A. Foster*), for respondent.

Amicus Curiae:

Marsha Levick and *Richard A. Foster* for the Juvenile Law Center.

Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM. In these consolidated appeals, the 15-year-old respondent, Cullen Tiemann, entered a plea of nolo contendere to a charge of third-degree criminal sexual conduct (CSC III) involving a victim between the ages of 13 and 16.[1] The trial court thereafter denied his motion to withdraw his plea, which, in part, was based on Tiemann's alleged lack of knowledge that his plea would result in him having to register under the Sex Offenders Registration Act (SORA).[2] The trial court entered an order of disposition, placing Tiemann on six months' probation in his parents' home. In Docket No. 303813, Tiemann appeals as of right that order of disposition. After the entry of the order of disposition, there was a consent hearing in the trial court pursuant to MCL 28.723a. The trial court then held that Tiemann had not met his burden of establishing consent by the victim and that he was therefore required to register under SORA. In Docket No. 306407, Tiemann also appeals that holding as of right. We affirm.

I. FACTS

On February 20, 2010, Tiemann went to HS's home at her invitation. They went to the guest house and proceeded to "make out." HS said that after Tiemann removed her shirt, she protested when he tried to remove her bra and told him "she really didn't want to do this." Tiemann allegedly told her that he had done this before and not to worry. HS said that ultimately,

[1] MCL 750.520d(1)(a).

[2] MCL 28.721 *et seq*.

Tiemann removed all her clothes, digitally penetrated her, and performed cunnilingus on her. She said that she told him that she "didn't want to" while he was digitally penetrating her but she then "gave in because she knew he wouldn't stop." She claimed that during the subsequent sexual acts, she told him to stop, and he did, but then he started again. HS said that Tiemann stopped completely when she told him to stop a second time. After that, they dressed, lay down on the couch together, and fell asleep.

Tiemann admitted that HS had said once that they were moving too fast, but that she then had said that she would be okay. He claimed that she pulled him back to her on three occasions when he asked if she wanted him to leave. He also acknowledged that HS had said that she wanted to stop while he was digitally penetrating her, and that he offered to leave. Further, he acknowledged that she had sat up and that he had laid her back down four times. He claimed that he was not forcing her during penile-vaginal sex. Further, he acknowledged understanding that she wanted to stop when she expressed that she was uncomfortable. When asked if he should have stopped, Tiemann said "Yeah, lots of times." Finally, Tiemann stated that he felt that he was being pushy when he told her to relax and be comfortable with it and that eventually it seemed that she was comfortable because it "felt like she just gave in." However, he said that he "forc[ed] it on her a couple of times" and that he knew it was wrong.

The prosecutor originally charged Tiemann with three counts of CSC III involving force or coercion and one count of fourth-degree CSC (CSC IV) involving force or coercion.[3] The prosecutor later amended the petition, charging Tiemann with three counts of CSC III with a

[3] MCL 750.520e(1)(b).

victim between the ages of 13 and 16 years of age "or defendant affected sexual penetration through force or coercion," and one count of CSC IV involving force or coercion.

The prosecutor later brought a motion in limine, seeking to prohibit the defense from mentioning that the 14-year-old victim was not charged, and seeking to prohibit Tiemann from raising a consent defense to the CSC III charges. In granting the motion, the trial court ruled that whether the victim was charged was a prosecutorial decision not relevant to the charges against Tiemann. Further, the trial court noted an absence of authority allowing consent to be raised when a defendant under the age of 16 has consensual sex with a victim under 16 years of age. In contrast, the trial court recognized that consent could not be raised as a defense to such a charge in a case where the defendant was an adult.[4]

After the trial court made these rulings, the parties reached a plea agreement whereby Tiemann was to plead no contest to one CSC III count and the other charges would be dismissed. After reviewing two case report summaries of interviews of the victim and Tiemann, the trial court accepted the plea. The trial court found a factual basis for a determination that Tiemann had intercourse with the victim who was between the ages of 13 and 16 (there was no mention of force or coercion).

Apparently, an initial order of adjudication indicated that Tiemann was convicted based on evidence showing the use of force or coercion. However, a corrected order of adjudication specifies that the victim's age was the basis for the conviction.

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[4] *People v Starks*, 473 Mich 227, 229-230; 701 NW2d 136 (2005).

Tiemann then moved to withdraw his plea. In essence, he averred that he had been unaware that he would have to register under SORA or that he had not understood the ramifications of registering. His attorney refuted the claim that he had not been adequately advised. Because the order of adjudication had apparently not yet been corrected, Tiemann also averred that he had passed a polygraph examination and had a meritorious defense to the charge to the extent that it was based on his alleged use of force and coercion. He was then advised that the order of adjudication would be corrected. Tiemann further argued that he was entitled to a trial because there was an issue regarding consent between similarly aged participants and that he should be able to present to a jury that a perpetrator and a victim were required for a conviction but that both participants in this case were "victims"; he suggested that this was a defense to the crime, not that it was a reason someone in his position could not be charged with the crime. He also argued that there was an equal protection problem resulting from charging the male but not the female, where both were under age 16. The trial court found that these issues were all addressed by the ruling on the motion in limine and that they were not a sufficient basis for withdrawal of the plea.

Thereafter, the trial court entered an order of disposition on April 18, 2011. An amendment to SORA subsequently took effect and provided that for cases pending on July 1, 2011, a juvenile could be excused from registration under SORA under certain circumstances if the juvenile could establish that the victim had consented.[5] The trial court therefore held a hearing on the issue of consent. At the hearing, various wit-

[5] MCL 28.723a(7).

nesses were called, and HS read a statement into the record giving a more detailed account of what transpired on the night in question. In this account, she indicated that she may have acquiesced "so that he wouldn't be so mean" but gave further indications that the sex was not consensual. Ultimately, the trial court found that Tiemann was not exempt from SORA registration requirements.

Tiemann now appeals.

II. APPLICATION OF MCL 750.520d TO CONSENSUAL SEXUAL INTERACTIONS BETWEEN MINORS

A. STANDARD OF REVIEW

Tiemann argues that MCL 750.520d violates public policy as applied to consenting minors in the same age class. Tiemann also argues that the statute is ambiguous. Because Tiemann did not raise this issue in the trial court, we will review this unpreserved constitutional issue for plain error affecting his substantial rights.[6] This issue also involves statutory interpretation, which is a question of law that we review de novo.[7]

B. PUBLIC POLICY

Tiemann's public policy argument has already been rejected in *In re Hildebrant*.[8] There, the 16-year-old female defendant became impregnated by her 14-year-old adopted brother, and she was prosecuted under MCL 750.520d(1)(a).[9] She argued that the statute did

[6] *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

[7] *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004).

[8] *In re Hildebrant*, 216 Mich App 384; 548 NW2d 715 (1996).

[9] *Id*. at 386.

not apply to offenders who fell within the statutorily protected age group because it would violate public policy.[10] This Court found no violation of public policy on the basis of the circumstances of that case, noting that the statute did not "exclude any class of offenders on the basis of age."[11] This Court further reasoned as follows:

> Prosecuting defendant would not violate the policy behind the criminal sexual conduct statute. *Because the purpose of the statute is the protection of the minor victim, the age of the offender is not a relevant concern*. Statutory rape, a strict-liability offense, has been upheld as a matter of public policy because of the need to protect children below a specific age from sexual intercourse. The public policy has its basis in the presumption that the children's immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct. Because this policy focuses on the exploitation of the victim, we find that the Legislature did not intend to withdraw the law's protection of the victim in order to protect the offender.
>
> Defendant maintains that laws prohibiting sexual conduct with a minor within a certain age range are intended to focus on the ability of the offender to exploit and manipulate the victim. While an older child could certainly manipulate a much younger child, defendant and the victim were less than two years apart in age. While we agree that consensual sexual relations involving two partners over a certain age might not involve exploitation or manipulation, it is not our role to create policy. *If our state legislature had intended that courts consider the age differential between the offender and the victim, it could have included this consideration in the criminal sexual conduct statutes*.[12]

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[10] *Id*. at 386-387.

[11] *Id*. at 386.

[12] *Id*. at 386-387 (citations omitted; emphasis added).

Tiemann takes issue with *Hildebrant*, arguing that it assumes that one child will always be the offender and the other a victim. He argues that if MCL 750.520d(1)(a) protects children between the ages of 13 and 16 because children in this age group can be exploited and manipulated, then when two minors within this class consent to a sexual act, both are "victims." However, Tiemann does not effectively distinguish *Hildebrant*, which stands for the proposition that there is no public policy bar to prosecution of one child who engages in sexual acts with another child when both children are within the same protected age group.[13]

C. AMBIGUITY

Tiemann raises several arguments in support of his contention that MCL 750.520d is ambiguous. We will address each argument in turn.

Citing the prevalence of teenagers having consensual sex, Tiemann argues that it would be absurd to conclude that the Legislature intended to criminalize such conduct. We first note that the statute, as plainly written, is unambiguous, so that this Court need not discern the Legislature's intent. In *People v Valentin*, the Michigan Supreme Court summarized the governing law on the interpretation of statutes:

> In resolving disputed interpretations of statutory language, it is the function of the reviewing court to effectuate

[13] See also *PG v State*, 616 SW2d 635, 641 (Tex Civ App, 1981) ("It would frustrate the intent of the statutes to hold that a child is protected from sexual abuse by adults, with or without his consent, but is not protected from sexual abuse by minors, with or without his consent. Children are entitled to no less protection from other children who sexually abuse them than they are from adults who sexually abuse them.").

> the legislative intent. *If the language used is clear, the Legislature must have intended the meaning it has plainly expressed, and the statute must be enforced as written*. However, if a statute is susceptible to more than one interpretation, the court must engage in judicial construction, and "a statute that is unambiguous on its face can be 'rendered ambiguous by its interaction with and its relation to other statutes.' "[14]

Moreover, while Tiemann's contention regarding the Legislature's intent has some merit, as the prosecutor points out, just because the violation of a law is prevalent does not mean that enforcement of that law is absurd.

Tiemann's next argument regarding ambiguity is convoluted. In essence, he asserts that the statute must be ambiguous because an unambiguous statute is a clear proclamation of public policy and the fact that the *Hildebrant* Court looked at the public policy underlying the statute was an indication that the statute is ambiguous. However, the Court in *Hildebrant* simply did not address the issue of ambiguity, relying instead on the plain language of the statute as indicative of the clear public policy underlying the statute.

Tiemann next argues that this statute has been rendered ambiguous because it cannot be harmonized with SORA, as amended. SORA requires that those convicted of a listed offense must register.[15] " 'Listed offense' " is defined as "a tier I, tier II, or tier III offense."[16] After its amendment, SORA states that a tier III offense includes, among other violations, a violation of MCL 750.520d *unless*

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[14] *People v Valentin*, 457 Mich 1, 5-6; 577 NW2d 73 (1998) (citations omitted).

[15] MCL 28.723.

[16] MCL 28.722(k).

> the court determines that the victim consented to the conduct constituting the violation, that the victim was at least 13 years of age but less than 16 years of age at the time of the offense, and that the individual is not more than 4 years older than the victim.[17]

Further, SORA provides:

> If an individual pleads guilty to or is found guilty of a listed offense or is adjudicated as a juvenile as being responsible for a listed offense but alleges that he or she is not required to register under this act because section 2(u)(*v*) or (*vi*) applies or section 2(w)(*iv*) applies, and the prosecuting attorney disputes that allegation, the court shall conduct a hearing on the matter before sentencing or disposition to determine whether the individual is required to register under this act.[18]

Tiemann argues that it would be irreconcilable if a defendant did not have to register under SORA after a finding of consent but would nonetheless remain convicted of consensual statutory rape. However, we see no conflict. A defendant is responsible for his or her illegal conduct, regardless of that defendant's duty to put law enforcement personnel and the public on notice of that illegal conduct.[19] The statutes are not " 'so incompatible that both cannot stand . . . .' "[20]

Tiemann last argues that the term "person" as used in the statute is ambiguous. MCL 750.520d(1)(a) provides:

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[17] MCL 28.722(w)(*iv*).

[18] MCL 28.723a(1).

[19] MCL 28.721a ("The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.").

[20] *Valentine v Redford Twp Supervisor*, 371 Mich 138, 144; 123 NW2d 227 (1963) (citation omitted).

> A *person* is guilty of criminal sexual conduct in the third degree if the *person* engages in sexual penetration with another person and if any of the following circumstances exist:
>
> (a) That other person is at least 13 years of age and under 16 years of age.[21]

Tiemann asserts that the term is ambiguous because "person" is so broad that it could arguably apply, for example, to a rape victim where the assailant was underage. Tiemann's argument that the statute is overbroad is in reality a constitutional argument. In *People v Newton*, this Court explained:

> A penal statute is unconstitutionally vague if (1) it does not provide fair notice of the conduct proscribed, (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, or (3) its coverage is overbroad and impinges on First Amendment freedoms. Defendant is not challenging the statute as being overbroad and impinging on First Amendment freedoms.
>
> When a defendant's vagueness challenge does not implicate First Amendment freedoms, the constitutionality of the statute in question must be examined in light of the particular facts at hand without concern for the hypothetical rights of others. The proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in this case.[22]

Thus, because Tiemann is not making a First Amendment argument, the question is whether "the statute is vague as applied to the conduct allegedly proscribed *in this case*."[23] That it may be vague with

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[21] Emphasis added.

[22] *People v Newton*, 257 Mich App 61, 66; 665 NW2d 504 (2003) (quotation marks and citations omitted).

[23] *Id*. (emphasis added; quotation marks and citations omitted).

respect to the conduct of a rape victim is not a relevant consideration in this case. The question *here* is whether it is vague with respect to proscribing the conduct of a child between the ages of 13 and 16 when it comes to consensual sex with another child between the ages of 13 and 16. *Hildebrant* establishes that a minor engaged in a consensual sexual act with another minor within the same age range can be regarded as an offender subject to prosecution. Thus, the statute cannot be deemed vague as applied to the conduct proscribed.

In sum, we reject Tiemann's argument that MCL 750.520d violates public policy or is ambiguous with regard to the prosecution of consenting minors engaging in sexual conduct.

III. EQUAL PROTECTION

A. STANDARD OF REVIEW

Tiemann argues that his constitutional right to equal protection was violated. He claims that he and HS were similarly situated because they were in the same protected class of 13- to 16-year-olds and, therefore, the charges against him were impermissibly based on his gender. Because he did not raise this issue in the trial court, we review it for plain error affecting a substantial right.[24]

B. LEGAL PRINCIPLES

In *In re Hawley*,[25] the 15-year-old respondent was charged under MCL 750.520b(1)(a) with having sexual relations with a child under the age of 13 years when he had had allegedly consensual sex with a 12-year-old girl. The respondent argued, like Tiemann here, that he was

[24] *Carines*, 460 Mich at 764.

[25] *In re Hawley*, 238 Mich App 509, 510; 606 NW2d 50 (1999).

prosecuted solely on the basis of his gender.[26] Quoting *People v Ford*,[27] this Court noted:

> Michigan has adopted a two-pronged test to determine whether a particular prosecution violates the Equal Protection Clause:
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> "First, it must be shown that the defendants were "singled" out for prosecution while others similarly situated were not prosecuted for the same conduct. Second, it must be established that this discriminatory selection in prosecution was based on an impermissible ground such as race, sex, religion or the exercise of a fundamental right."[28]

Preliminarily, the Court found that the offender and the victim were not similarly situated because they were in different age ranges as set forth in the statute and because greater protection was afforded to children under 13 years of age.[29] Moreover, the Court found that the younger age of the victim was a valid basis for deciding to prosecute the boy and not the girl and that the respondent had failed to establish that his gender was the reason for prosecuting him and not the girl.[30]

Here, Tiemann and HS were similarly situated. Although she was 14 and he was 15 years of age, they were within the same age classification under the statute. Thus, if Tiemann could establish that he was prosecuted because of his gender, he could establish an equal protection violation.

C. ANALYSIS

Tiemann argues that he could not have been prosecuted on the basis of an alleged lack of consent because

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[26] *Id*. at 510-511.

[27] *People v Ford*, 417 Mich 66, 102; 331 NW2d 878 (1982).

[28] *In re Hawley*, 238 Mich App at 513.

[29] See *id*. at 513-514.

[30] *Id*. at 514.

there was evidence that HS was a willing participant. While there were indications to this effect during part of the encounter, Tiemann also said that he kept engaging in sexual acts even after HS indicated that she was uncomfortable, that he understood that she wanted to stop at least at one point, that he should have stopped "lots of times," and, most telling, that he "forc[ed] it on her a couple of times." Thus, there was evidence indicating that Tiemann was more likely charged because of his aggressive behavior, not because he was a male. Thus, Tiemann has not established that he was charged because of his gender or that his equal protection rights were violated.

IV. FACTUAL BASIS FOR THE PLEA

Tiemann argues that the factual basis for his plea was impermissibly based on a police report referring to interviews of him and the victim. However, at the plea hearing, Tiemann did not challenge the factual basis or the use of the documents to establish that factual basis, and his counsel indicated satisfaction with the taking of the plea. Moreover, Tiemann did not raise this issue in his motion to withdraw the plea. Accordingly, Tiemann has waived this issue,[31] thereby extinguishing any alleged error and foreclosing appellate review.[32]

V. REGISTRATION UNDER SORA

Tiemann argues that he should not have been required to register under SORA until after the consent hearing. However, after the filing of Tiemann's brief on June 24,

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[31] *People v Kaczorowski*, 190 Mich App 165, 172-173; 475 NW2d 861 (1991).

[32] *People v McGraw*, 484 Mich 120, 138; 771 NW2d 655 (2009) (CORRIGAN, J., dissenting).

2011, in his appeal of the order of disposition (Docket No. 303813), he had a hearing on the issue of consent on September 1 and 6, 2011. Therefore, this issue is moot.[33]

VI. NOTICE

Tiemann's next issue, raised in Docket No. 306407, is that he could not be prosecuted for a strict liability offense because he was not on notice of the conduct proscribed. However, the appeal in Docket No. 306407 is not from the order of adjudication or disposition, but from the order issued after the consent hearing. This issue should have been raised in Docket No. 303813. Thus, it is not properly before the Court.

VII. DUE PROCESS

A. STANDARD OF REVIEW

Tiemann argues that the consent hearing was a quasi-criminal proceeding and that he should have been afforded additional procedural due process guarantees along the lines of those afforded in *Mathews v Eldridge*.[34] He argues that he should not have been burdened with proving consent by a preponderance of the evidence and that he should have been entitled to cross-examine HS. Amicus curiae Juvenile Law Center reiterates this argument but also contends that Tiemann's Sixth Amendment right of confrontation was violated when Tiemann was not allowed to cross-examine HS. Because he did not raise this issue in the trial court, we review it for plain error affecting a substantial right.[35]

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[33] See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

[34] *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976).

[35] *Carines*, 460 Mich at 764.

B. PROCEDURAL DUE PROCESS

In *In re VanDalen*,[36] this Court recently set forth the analysis applicable to claims of procedural due process violations:

> Procedural due process " 'limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by due process, such as life, liberty, or property.' " " 'A procedural due process analysis requires a court to consider "(1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient." ' " Generally, three factors will be considered to determine what is required by due process:
>
> " 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.' "

With regard to the issue of due process in relation to SORA hearings, in *In re Wentworth*,[37] this Court concluded:

> [N]o due process rights are implicated by the SORA. The SORA did not deprive respondent of liberty. Any deprivation respondent suffered flowed not from the act, but from her own misconduct that resulted in the juvenile disposition. Injury to a person's reputation is not a protected liberty or property interest.

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[36] *In re VanDalen*, 293 Mich App 120, 132; 809 NW2d 412 (2011) (citations omitted).

[37] *In re Wentworth*, 251 Mich App 560, 565-566; 651 NW2d 773 (2002) (citations omitted).

More directly, this Court has determined that SORA is regulatory and does not impose punishment.[38] Further, in *Doe v Kelley*,[39] the United States District Court for the Western District of Michigan expressly found that SORA did not implicate procedural due process:

> *With respect to the due process claim, plaintiffs have failed to show that the amendment threatens to deprive them of any protected liberty or property interest. The amendment, again, does nothing more than compile truthful, public information and make it available.* To the extent public use of such information may result in damage to plaintiffs' reputation or may destablize their employment and other community relations, such effects are purely speculative on the present record and, in any event, would appear to flow most directly from plaintiffs' own convicted misconduct and from private citizens' reaction thereto, and only tangentially from state action.

Because the effects of SORA do not implicate a liberty or property interest, the Due Process Clause does not provide Tiemann with procedural safeguards. In this case, any safeguards would be those afforded by the statute.

C. RIGHT TO CONFRONTATION

Regarding the Confrontation Clause, US Const, Am VI provides:

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[38] See *In re TD*, 292 Mich App 678, 682-683, 691; 823 NW2d 101 (2011) (concluding that requiring a rehabilitated juvenile to register under SORA does not constitute cruel and unusual punishment), citing *People v Pennington*, 240 Mich App 188, 191-192; 610 NW2d 608 (2000) (holding that the registration requirements were not punishment and that SORA therefore did not violate the constitutional prohibition against ex post facto laws), and *People v Golba*, 273 Mich App 603; 729 NW2d 916 (2007).

[39] *Doe v Kelley*, 961 F Supp 1105, 1112 (WD Mich, 1997) (emphasis added). See *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 364; 604 NW2d 330 (2000) ("federal court decisions are not precedentially binding on questions of Michigan law"; however, a Michigan state court may choose to agree with the analysis of a federal court decision).

> *In all criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[40]

Similarly, Const 1963, art 1, § 20 provides:

> *In every criminal prosecution*, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.[41]

SORA is not a criminal statute. Therefore, because SORA is a regulatory statute[42] and not a criminal

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[40] Emphasis added.

[41] Emphasis added. See also MCL 763.1.

[42] As the Court noted in *Pennington*, 240 Mich App at 193, quoting *Lanni v Engler*, 994 F Supp 849, 853 (ED Mich, 1998):

> "Although the Act does not contain an express statement of legislative intent, the implied purpose is plainly regulatory. Neither notification or [sic] registration inflicts suffering, disability, or restraint on the registered sex offender. It does nothing more than create a method for easier public access to compiled information that is otherwise available to the public through tedious research in criminal court files. Like similar laws in other states, the Michigan Act also seeks to provide the local citizenry with information concern-

statute, a "criminal prosecution" is not at issue and neither Confrontation Clause applies.

We affirm.

WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ., concurred.

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ing persons residing near them who have been convicted of sexually predatory conduct and who, by virtue of relatively high recidivism rates among such offenders and the devastating impact that sex crimes have on society, pose a serious threat to society." [Citations omitted.]

RICHARD v SCHNEIDERMAN & SHERMAN, PC (ON REMAND)

Docket No. 297353. Submitted May 24, 2012, at Lansing. Decided July 3, 2012, at 9:20 a.m.

Aaron Richard brought an action in the Wayne Circuit Court against Schneiderman & Sherman, P.C., GMAC Mortgage, and Mortgage Electronic Registration Systems, Inc. (MERS). Plaintiff had purchased real property, obtaining financing in part through a $50,000 loan from Homecomings Financial Network, Inc. The loan was simultaneously secured by a mortgage with MERS as the nominee of Homecomings. Schneiderman, acting as GMAC's agent, notified plaintiff that his mortgage was in default and informed him of his rights. MERS subsequently began nonjudicial foreclosure by advertisement under MCL 600.3201 *et seq*. and purchased the property at the subsequent sheriff's sale. Plaintiff's suit was brought during the redemption period and challenged the sheriff's sale on numerous grounds. Defendants moved for summary disposition, which the court, Michael F. Sapala, J., granted. Plaintiff appealed. The Court of Appeals, BORRELLO, P.J., and METER and SHAPIRO, JJ., reversed, vacated the foreclosure proceeding, and remanded for further proceedings. 294 Mich App 37 (2011). In lieu of granting defendants' application for leave to appeal, the Supreme Court vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for reconsideration in light of *Residential Funding Co, LLC, v Saurman*, 490 Mich 909 (2011). 490 Mich 1001 (2012).

On remand, the Court of Appeals *held*:

1. In *Saurman*, the Supreme Court held that MERS, as record-holder of the mortgage, owned a security lien on the property at issue in that case, which authorized MERS to foreclose by advertisement under MCL 600.3204(1)(d). Because the relationships between MERS, Homecomings, and the borrowers in both this case and *Saurman* were, for pertinent purposes, identical, *Saurman* required a holding that MERS was authorized to foreclose by advertisement in this case.

2. If the grounds asserted in support of summary disposition are based the failure to state a claim, the failure to state a defense, or the lack of a material factual dispute, the court must give the

parties an opportunity to amend their pleadings unless the evidence then before the court shows that amendment would not be justified. However, leave to amend may still be denied if amendment would be futile. In this case, plaintiff's proposed amended complaint contained claims and arguments that he had already advanced in opposition to defendants' motion for summary disposition, and defendants had already offered evidence and argument to refute plaintiff's claims. Thus, most of the contents of plaintiff's proposed amended complaint were subject to dismissal under MCR 2.116(C)(10) for the same reasons that his original complaint was subject to dismissal. To the extent that plaintiff advanced new claims in the proposed amended complaint, those claims were subject to dismissal under MCR 2.116(C)(10) because he offered no documentary evidence in support of them that would have been sufficient to challenge defendants' otherwise unrebutted evidence at trial. Accordingly, amendment would have been futile.

Affirmed.

Aaron Richard in *propria persona*.

Schneiderman & Sherman, P.C. (by *Andrew J. Hubbs* and *Erin R. Katz*), for defendants.

ON REMAND

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM. This case, involving a nonjudicial foreclosure by advertisement, is before us on remand from the Supreme Court, which vacated our prior opinion and remanded for reconsideration in light of *Residential Funding Co, LLC v Saurman*, 490 Mich 909 (2011). *Richard v Schneiderman & Sherman, PC*, 490 Mich 1001 (2012). We now affirm.

In both *Saurman* and this case, Homecomings Financial Network, Inc., made the underlying loan. Also in both cases, Homecomings was designated as the lender on the underlying note and as the lender, but not the mortgagee, on the mortgage. Mortgage Electronic Registration Systems, Inc. (MERS) was listed as the mort-

gagee. Because the relationships between MERS, Homecomings, and the borrowers in both cases are for pertinent purposes identical, *Saurman* requires a holding that MERS was authorized to foreclose by advertisement.

Plaintiff also argues that the trial court erred by failing to rule on his motion to amend the complaint after the court granted defendants' motion for summary disposition. Plaintiff primarily claims that a court clerk misinformed him by stating that the court would not hear the motion to amend in light of the summary disposition ruling; in reliance on the clerk's statement, plaintiff states that he failed to appear for a hearing at which the court would have addressed his motion. Significantly, plaintiff did not raise these claims of error before the trial court. He did not request a ruling on his motion to amend at the March 26, 2010, hearing on defendants' motion for summary disposition. He also failed to challenge the factual or legal correctness of the clerk's assertion that the motion would not be considered. Accordingly, plaintiff did not preserve his arguments for appeal and our review is for plain error. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 149-150; 792 NW2d 749 (2010). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Id*. at 150. In this case, even if we accept, for purposes of argument, that clear errors attributable to the court resulted in the court's failure to hear plaintiff's motion to amend the complaint, reversal is not required because plaintiff has not shown that he was prejudiced.

In his original complaint, plaintiff centrally claimed that defendants' debt collection and foreclosure proceedings against him were flawed because defendants

violated the Real Estate Settlement and Procedures Act (RESPA), 12 USC 2601 *et seq*., and the Fair Debt Collection Practices Act (FDCPA), 15 USC 1692 *et seq*. Plaintiff did not dispute that he had defaulted on his mortgage. Rather, he alleged that defendants had failed to validate his debt because they had refused to send him the original promissory note, instead of a copy of the note, associated with his loan and mortgage. But the trial court implicitly accepted, through its ruling, defendants' argument that plaintiff had failed to provide a cognizable argument or documentary evidence to support his claim that the copy was insufficient to validate the debt or to raise a genuine question regarding the authenticity of the original.[1] The trial court also accepted defendants' argument that plaintiff had failed to otherwise specify how the documents supplied to him by defendants were insufficient to satisfy RESPA and the FDCPA or how any insufficiency invalidated the foreclosure proceedings and subsequent sheriff's sale of the property. Accordingly, the trial court granted defendants' motion for summary disposition under MCR 2.116(C)(10), concluding that plaintiff had failed to provide documentary evidence supporting his allegations.

Plaintiff does not challenge the trial court's ruling under MCR 2.116(C)(10). Rather, as is most significant to plaintiff's arguments on appeal, plaintiff moved to amend his complaint in order to add new claims and supply detail with regard to his original claims. He correctly observes that, pursuant to MCR 2.116(I)(5), "[i]f the grounds asserted [in support of summary

[1] See MRE 1003 ("A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.").

disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." Of particular relevance here, MCR 2.118(A)(2) specifies that "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." Leave may still be denied, however, if amendment would be futile. *Decker v Rochowiak*, 287 Mich App 666, 682; 791 NW2d 507 (2010).

In this case, amendment would have been futile. Plaintiff's proposed amended complaint primarily expanded his argument that defendants violated RESPA and the FDCPA by failing to provide the original promissory note and other documents or information requested by plaintiff. But the trial court had already determined that plaintiff had failed to support these claims, and the additions to plaintiff's proposed amended complaint concerning these claims were essentially identical to the arguments he had advanced in opposition to defendants' motion for summary disposition.

To the extent plaintiff added other discernable claims not entirely dependent on the success of the RESPA and FDCPA claims, he newly asserted that defendant Schneiderman & Sherman, P.C. (Schneiderman) had violated MCL 600.3208[2] by failing to provide or post a copy of the notice of foreclosure within 15 days of the first publication of the notice in a newspaper. He also newly claimed that defendant GMAC Mortgage had

[2] The pertinent portion of MCL 600.3208 states, "In every case within 15 days after the first publication of the notice, a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice."

never sent a notice of default or of its intent to accelerate the mortgage before foreclosure. But because plaintiff raised these same issues in opposition to defendants' motion for summary disposition, defendants had already offered evidence and argument to refute them, and plaintiff did not counter defendants' offerings with contrary documentary evidence. In particular, plaintiff offered no evidence or specific argument to dispute the Affidavit of Posting provided by defendants, which states that Schneiderman posted notice of foreclosure at the property on November 6, 2009, two days after the notice of foreclosure was first published, on November 4, 2009, according to defendants' Affidavit of Publication. Plaintiff also offered no evidence or argument to dispute that GMAC sent plaintiff a notice of default, which also stated the accelerated amount of debt owed, through its clearly identified collections agent, Schneiderman; defendants had provided proof of this fact by offering a copy of the October 9, 2009, notice mailed to plaintiff by Schneiderman. Finally, the remaining claims in plaintiff's proposed amended complaint—including that defendants were unjustly enriched or liable for slander of title—were dependent on plaintiff's unsupported claims that defendants had violated RESPA and the FDCPA or had provided improper notice of the foreclosure proceedings.

In sum, most of the contents of plaintiff's proposed amended complaint were subject to dismissal under MCR 2.116(C)(10) for the same reasons his original complaint was subject to dismissal. Plaintiff's new claims were similarly subject to dismissal under this rule because he offered no documentary evidence in support of them that would have been sufficient to challenge defendants' otherwise unrebutted evidence at trial. Accordingly, amendment of the complaint would have been futile. For this reason, plaintiff was not

prejudiced by the trial court's failure to rule on his motion for leave to amend the complaint or by the alleged misinformation that plaintiff states caused him not to appear at a scheduled hearing to address his motion. Indeed, plaintiff does not even argue that he was prejudiced because the trial court likely would have *granted* his motion if he had appeared at the hearing; he simply argues that, had he not been misinformed, he would have had the *opportunity* to orally argue his motion and would have received a ruling on it.

Given that plaintiff has not shown that he was prejudiced because the *outcome* of the proceedings likely would have been different absent any error, there is no plain error justifying reversal. *Duray Development*, 288 Mich App at 150.

Affirmed.

BORRELLO, P.J., and METER and SHAPIRO, JJ., concurred.

PEOPLE v LEVIGNE

PEOPLE v McNEIGHT

Docket Nos. 306776 and 306777. Submitted June 13, 2012, at Lansing. Decided July 3, 2012, at 9:25 a.m. Leave to appeal denied, 493 Mich 882.

Blaine R. Levigne, Jr., and William G. McNeight were convicted of unlawfully taking a bear in violation of MCL 324.40118(3) following a bench trial before the 90th District Court, Richard W. May, J. Defendants had used trained hunting dogs to assist Todd Yoder, a Native American hunter, in harvesting a bear out of hunting season. Defendants appealed their convictions in the Emmet Circuit Court. The circuit court, Charles W. Johnson, J., affirmed defendants' convictions. The Court of Appeals granted defendants' applications for leave to appeal and consolidated their cases.

The Court of Appeals *held*:

A person is guilty of a misdemeanor if he or she violates an order issued under part 401 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.40101 *et seq*., regarding the taking of certain animals including bear. In this case, defendants were alleged to have violated former Wildlife Conservation Order (WCO) 3.203(4) issued by the Department of Natural Resources, which set forth the open season for taking a bear with firearms, crossbows, or bow and arrow in the Red Oak Bear Management Unit. Part 401 of NREPA defines "take" as to hunt with any weapon, dog, raptor or other wild or domestic animal trained for that purpose; kill; chase; follow; harass; harm; pursue; shoot; rob; trap; capture; or collect animals or attempt to engage in that activity. It was reasonable to conclude that defendants committed a taking under the statutory definition by pursuing, chasing, following, and harassing the bear with hunting dogs, but former WCO 3.203(4) did not prohibit the mere taking of a bear. Rather, it concerned the taking of a bear with firearms, crossbows, or bow and arrow. MCL 324.40118(3) and former WCO 3.203(4) did not prohibit an unarmed individual from assisting someone with the lawful taking of a bear, nor did they prohibit someone from taking a bear without a firearm, crossbow, or bow and arrow.

Because neither defendant used a firearm, crossbow, or bow and arrow to take the bear, there was insufficient evidence presented to support their convictions.

Reversed.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *James R. Linderman*, Prosecuting Attorney, and *E. Michael McNamara*, Assistant Prosecuting Attorney, for the people.

James A. Bias for defendants.

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM. William McNeight and Blaine Levigne, Jr.,[1] appeal by leave granted the circuit court's order affirming their convictions before the district court for unlawfully taking a bear in violation of MCL 324.40118(3). Defendants were charged with a misdemeanor violation of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*, for using trained hunting dogs to assist Todd Yoder, a Native American hunter, in capturing and killing a bear out of hunting season. We reverse.

The prosecution argued that defendants unlawfully took a bear outside of the season in which it is lawful to hunt bear with the use of a firearm, which was defined by the Department of Natural Resources (DNR) in former Wildlife Conservation Order (WCO) 3.203(4) as having run between September 17 and September 25,

[1] The spelling of "Levigne" is inconsistent in the record. Most of the court documents spell his name as "Lavigne," while the documents submitted by defendants' attorney (including those filed in this appeal) identify the defendant as "Levigne."

2010.[2] The prosecution asserted that MCL 324.40118(3) precludes the unlawful "taking" of a bear, which is defined in the statute to include both hunting and attempting to hunt. The prosecution also claimed that Yoder's permit to hunt out of season did not extend to defendants and did not permit them to assist him. Because defendants knowingly assisted Yoder in capturing and killing a bear on October 23, 2010, the prosecution argued that defendants could not claim that they were only "training" their animals out of season.

Defendants argued that they did not break the law because their no-kill tags permitted them to participate in a bear hunt out of season as long as they did not kill the bear. Defendants asserted that the tags were designed to limit the number of bears harvested, not the number of participants permitted in a bear hunt. Because Yoder was authorized by his permit to hunt bear until October 26, 2010, and defendants did not actually kill the bear, defendants reasoned that they did not violate the law. Defendants conceded that they were participating in the hunt, rather than training their dogs to hunt bear, because they intended to assist Yoder in harvesting the bear. While defendants claimed that the law did not prohibit them from acting as licensed hunting guides, they also conceded that Yoder would not have been able to harvest the bear without their assistance.

The district court found defendants guilty of violating MCL 324.40118(3). The court noted that the essential question before it was whether defendants were lawfully permitted to participate in a bear hunt out of season given that the hunter had a valid permit to hunt

[2] The relevant order, WCO 3.203, has been amended several times. At the time that defendants participated in the hunt at issue here, WCO 3.203 as amended by 2010 Amendment 17 was controlling.

out of season. The court concluded that defendants' own no-kill permits restricted their right to participate in bear hunting outside of the hunting season specified for authorized Michigan residents.

During the appeal before the circuit court on September 9, 2011, the parties reasserted the arguments they had made before the district court. Defendants additionally argued that they did not "take" the bear because longstanding precedent requires that a hunter possess or capture an animal before it can be "taken." Because they did not chase the bear while using a gun or bow, defendants argued, they could not have committed a "taking" under the statute. Plaintiff responded that "taking" is defined by statute to include defendants' chasing and capturing of the bear. The circuit court affirmed the district court convictions, reasoning that defendants were participating in a bear hunt out of season, which constituted hunting under the statute. The court specifically held as follows:

> Whether they were carrying a gun, or discharged the gun themselves, they were participating in hunting and therefore using hunting in its commonly understood term, they were hunting as participants in the hunt. And the clear language of the statute says that these Defendants are not permitted to do that outside of the bear hunting season.

Defendants now appeal the circuit court's order affirming their convictions.

On appeal, defendants assert that the district court was precluded from finding that they acted in violation of MCL 324.40118(3). We agree. Defendants' sole issue on appeal is essentially an argument that the evidence presented at trial did not demonstrate that they committed an action proscribed by law. In reviewing a challenge to the sufficiency of the evidence, we view the

evidence in the light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-269; 380 NW2d 11 (1985). Essential to defendants' argument on appeal is the claim that the district court erred in interpreting MCL 324.40118(3). On appeal, questions of statutory interpretation are reviewed de novo. *People v Buehler*, 477 Mich 18, 23; 727 NW2d 127 (2007).

Defendants were convicted of violating MCL 324.40118(3), which provides as follows:

> A person who violates a provision of this part or an order or interim order issued under this part regarding the possession or taking of deer, bear, or wild turkey is guilty of a misdemeanor and shall be punished by imprisonment for not less than 5 days or more than 90 days, and a fine of not less than $200.00 or more than $1,000.00, and the costs of prosecution.

Under this statutory language, a person is guilty of a misdemeanor if that person violates a provision or order issued under part 401 of NREPA, MCL 324.40101 *et seq*., related to the taking of certain animals. In the present case, defendants are alleged to have violated former WCO 3.203(4), which provided:

> The open season for taking a bear with firearms, crossbows, or bow and arrow in the red oak bear management unit in zone 2 shall be from the first Friday following September 15 and 8 days thereafter. The open season for taking a bear with bow and arrow only in the red oak bear management unit shall be from the first Friday following October 1 through 6 days thereafter.

In charging defendants with a violation of MCL 324.40118(3), the prosecution theorized that defendants' conduct constituted the taking of a bear. That

theory is largely based on the statutory definition of the term "take." "Take" is statutorily defined as "to hunt with any weapon, dog, raptor, or other wild or domestic animal trained for that purpose; kill; chase; follow; harass; harm; pursue; shoot; rob; trap; capture; or collect animals, or to attempt to engage in such an activity." MCL 324.40104(1). As a result of their interpretations of this statutory provision, both the prosecution and the lower courts have determined that defendants, by working in concert with Yoder, took the bear when they used dogs to tree the bear before Yoder shot it.

It is certainly reasonable to conclude that defendants, by pursuing, chasing, following, and harassing a bear with hunting dogs did commit a taking under the statutory definition of that term. However, former WCO 3.203(4) did not merely prohibit the taking of a bear. Rather, the order at issue placed qualifying language after the term "taking a bear" in the form of the phrase "with firearms, crossbows, or bow and arrow . . . ." Former WCO 3.203(4). The parties agree that neither of these defendants used a firearm, crossbow, or bow and arrow while assisting Yoder. As the prosecution admits, these defendants were not convicted on a theory of aiding and abetting the unlawful taking of a bear. Indeed, the circuit court emphasized that whether these defendants used a gun was irrelevant to its determination. However, when interpreting a statute, the court's goal is to give effect to the intent of the Legislature. *People v Hill*, 486 Mich 658, 667-668; 786 NW2d 601 (2010). Unless ambiguous, statutory language should be given its ordinary meaning because the Legislature is presumed to have intended the meaning expressed in the statute. *Id*. MCL 324.40118(3) and former WCO 3.203(4) did not prohibit an unarmed individual from assisting someone with the lawful taking of a bear, nor

did they prohibit someone from taking a bear *without* a firearm, crossbow, or bow and arrow. Had the Legislature or the DNR intended to prohibit that behavior, the language used in the order and statute would have expressed that intent. Because the parties stipulated that neither defendant used a firearm, crossbow, or bow and arrow to take the bear, there was insufficient evidence presented to support a conviction under MCL 324.40118(3) and former WCO 3.203(4).

Reversed.

BECKERING, P.J., and FITZGERALD and STEPHENS, JJ., concurred.

LEELANAU COUNTY SHERIFF v KIESSEL

Docket No. 302195. Submitted May 10, 2012, at Marquette. Decided July 5, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 877.

The Leelanau County Sheriff and Leelanau County brought an action in the Leelanau Circuit Court seeking a writ of superintending control vacating an order of the Leelanau County Prosecuting Attorney, who was serving as a hearing officer under the veteran's preference act (VPA), MCL 35.401 et seq. The sheriff had terminated James Kiessel from his position as a deputy sheriff because of alleged misconduct in the performance of his duties. Kiessel filed a counterclaim seeking a writ of mandamus ordering the county and the sheriff to comply with the prosecutor's order. Kiessel, an honorably discharged veteran, had requested a hearing regarding his termination before the prosecutor under the VPA. Following the hearing, the prosecutor concluded that Kiessel had not engaged in official misconduct or serious or willful neglect in the performance of his duties and ordered the sheriff to reinstate Kiessel to his position with full back pay and benefits. In the circuit court, the county and the sheriff asserted for the first time that the prosecutor was without jurisdiction to order the sheriff to hire, fire, or reinstate a deputy. The court, Thomas G. Power, J., remanded the matter to the prosecutor for the prosecutor's consideration of the jurisdictional issue. On remand, the prosecutor upheld his own jurisdiction and confirmed his original ruling. The circuit court disagreed, concluding that the sheriff's power to appoint and revoke the appointment of deputies was of constitutional magnitude and could not be overridden by the VPA. Accordingly, the circuit court vacated the orders issued by the prosecutor. Kiessel appealed.

The Court of Appeals *held*:

1. The appellant is responsible for securing the filing of transcripts as required under MCR 7.210(B)(1)(a). Kiessel's initial failure to file the full transcripts of the circuit court proceedings did not result in his waiver of the right to appellate review given that the full transcripts of the circuit court proceedings were ultimately provided, the transcripts initially omitted were not relevant to the issues on appeal, the transcripts initially omitted

were not necessary for review of the issues by the Court of Appeals, and the transcripts of the hearing before the prosecutor were part of the record before the Court of Appeals.

2. Article 7, § 4 of the Michigan Constitution confers on the Legislature the authority to prescribe the duties and powers of a sheriff. It does not preclude the Legislature from limiting a sheriff's authority to discharge deputies at will. The VPA provides that honorably discharged veterans may be removed, transferred, or suspended from employment in a public department or public works only for cause, after written notice and a hearing, which—with respect to county employees—must occur before the prosecuting attorney. The only statutory exceptions under the VPA concern heads of departments, members of commissions, and boards and heads of institutions appointed by the Governor, officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments, heads of institutions, and officers. For the purposes of the VPA, a "public department" is a division of official duties or functions, a branch of government, or a distinct part of a governmental organization. A sheriff's department is an agency of the county and is, thus, a public department under the VPA. MCL 51.70 states that each sheriff may appoint one or more deputies at the sheriff's pleasure and may revoke those appointments at any time. Because the exception to the VPA for first deputies—the existence of which implies that regular deputies are covered by the VPA—was enacted after MCL 51.70, the last enacted substantive provision, the VPA as amended by 1931 PA 67, controls. This is so because the Legislature is aware of the existence of the law in effect at the time of its enactments and recognizes that, because one Legislature cannot bind the power of its successor, existing statutory language cannot be a bar to further exceptions set forth in subsequent, substantive enactments. The fact that the VPA is a remedial statute intended to benefit honorably discharged veterans also militates in favor of its application to deputy sheriffs. When offices which have a known common-law legal character are established in the Michigan Constitution, the Legislature cannot retain the names but destroy the powers of such offices or change the duties of the office so as to practically change the office. The office of sheriff is a constitutional office. However, the power to discharge without cause is not essential to the common-law legal character of a sheriff, is not inherent, and is subject to statutory limitation under the VPA. The constitutional principle of the separation of powers does not apply to one executive branch officer reviewing whether another executive branch officer has complied with the VPA limitation on the removal, transfer, or suspension of

honorably discharged veterans. In this case, both the prosecutor and the sheriff belonged to the executive branch of government and no constitutional violation occurred when the prosecutor reviewed the sheriff's actions. Thus, the circuit court erred when it held that the prosecuting attorney lacked jurisdiction to review the sheriff's termination of Kiessel. Although a sheriff's power to hire, fire, and discipline is not absolute, the matter of which of the sheriff's deputies shall be delegated the powers of law enforcement entrusted to the sheriff by the Constitution is a matter entirely within the sheriff's discretion and inherent in the nature of the office, and may not be infringed on by the Legislature nor delegated to a third party. Any order of reinstatement must recognize the discretion vested in the sheriff.

Writ of superintending control vacated; case remanded to the circuit court for consideration of the merits of the appeal of the prosecutor's order.

1. SHERIFFS AND CONSTABLES — VETERAN'S PREFERENCE ACT — DEPUTY SHERIFFS — APPLICABILITY.

The veteran's preference act protects deputy sheriffs, other than the first deputy, from termination absent cause, notice, and a hearing (MCL 35.401 *et seq*., MCL 51.70).

2. SHERIFFS AND CONSTABLES — LAW ENFORCEMENT POWERS — DELEGATION — DEPUTY SHERIFFS.

Although a sheriff's power to hire, fire, and discipline is not absolute, the matter of which of the sheriff's deputies shall be delegated the powers of law enforcement entrusted to the sheriff by the Constitution is a matter entirely within the sheriff's discretion and inherent in the nature of the office, and may not be infringed on by the Legislature nor delegated to a third party (Const 1963, art 7, § 4).

Cohl, Stoker & Toskey, P.C. (by *Bonnie G. Toskey*), for the Leelanau County Sheriff and Leelanau County.

Michael H. Dettmer, *William R. Rastetter*, and *Katherine E. Redman* for James Kiessel.

Amicus Curiae:

Abbott Nicholson, P.C. (by *John R. McGlinchey* and *Kristen L. Baiardi*), for the Michigan Sheriffs' Association.

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM. Defendant James Kiessel appeals by right a circuit court order granting plaintiffs the Leelanau County Sheriff and Leelanau County a writ of superintending control vacating an order of the Leelanau County Prosecuting Attorney (PA), who was serving as a hearing officer under the veterans preference act (VPA), MCL 35.401 *et seq*. The PA's order had directed the sheriff to reinstate Kiessel, with back pay, as a deputy. The circuit court held that the PA lacked jurisdiction under the VPA to review the sheriff's discharge of Kiessel, an honorably discharged veteran, because under MCL 51.70, deputies serve at a sheriff's pleasure. We hold, for the reasons discussed hereafter, that the VPA does authorize the PA to review the sheriff's discharge of Kiessel and, if appropriate, to order his "reinstatement at the same rate of pay received by him at the date of dismissal," with back pay. MCL 35.402. But any order of reinstatement must recognize the discretion vested in the sheriff regarding the manner in which the duties of the office are fulfilled, including the delegation of law enforcement powers. See *Fraternal Order of Police, Ionia Co Lodge No. 157 v Bensinger*, 122 Mich App 437, 445-446; 333 NW2d 73 (1983); *Labor Mediation Bd v Tuscola Co Sheriff*, 25 Mich App 159, 164; 181 NW2d 44 (1970). Accordingly, we vacate the writ of superintending control and remand to the circuit court to consider in the first instance the merits of plaintiffs' appeal of the PA's order.

I. KIESSEL DID NOT WAIVE APPELLATE REVIEW

We first reject plaintiffs' argument that Kiessel waived appellate review by failing to furnish, as required by MCR 7.210(B)(1)(a), the complete transcripts

of the VPA proceedings and a hearing held on October 25, 2010, when the circuit court remanded this case to the PA to consider the jurisdictional question at issue in this appeal. Plaintiffs contend that the failure to file the "full transcript," whether relevant or not to the issues on appeal, constitutes a waiver of appellate review. See, e.g., *Reed v Reed*, 265 Mich App 131, 160-161; 693 NW2d 825 (2005), and *Nye v Gable, Nelson & Murphy*, 169 Mich App 411, 413-414; 425 NW2d 797 (1988).

Kiessel argues that he has now complied with MCR 7.210(B)(1)(a) by providing transcripts of all proceedings in the circuit court. He further contends that the failure to initially file some transcripts should not constitute a waiver of his right to appeal because the missing transcripts were not relevant to the issues on appeal. Kiessel also asserts that the issues on appeal present legal questions that this Court reviews de novo, and the omitted transcripts are not necessary for this Court's review. Additionally, he notes that the VPA hearing transcripts are part of the circuit court record before this Court.

We find Kiessel's arguments have merit and conclude that he has not waived his right to appellate review.

II. FACTS AND PROCEEDINGS

On October 30, 2009, the elected Sheriff of Leelanau County, Michael Olstersdorf, terminated Kiessel from his position as a deputy sheriff with the rank of sergeant for "severe misconduct" in the arrest of two persons.[1] The parties agree that Kiessel is an honorably

[1] One person was arrested for obstructing police, but the PA declined to prosecute because he concluded that the arrested person could lawfully refuse, under the Fourth Amendment, Kiessel's oral command to produce that person's son from within their home. In his VPA ruling, the PA found that "Kiessel was incorrect in arresting [the person] under these

discharged veteran under Michigan law who would ordinarily have a right under the VPA to a hearing regarding his discharge. MCL 35.401; MCL 35.402. Kiessel timely requested a hearing before the statutory hearing officer, Leelanau County Prosecutor Joseph T. Hubbell, naming both the sheriff and the county as respondents. After a three-day hearing, the PA issued a lengthy opinion and order on May 12, 2010, finding that Kiessel's conduct did not constitute "official misconduct" or "serious or willful neglect in the performance of duty" under MCL 35.402 and ordering the sheriff to reinstate Kiessel to his position with full back pay and benefits.

Plaintiffs timely filed a complaint for a writ of superintending control in the circuit court, asserting among other reasons for the issuance of a writ that the PA was without jurisdiction to order an elected sheriff to hire, fire, or reinstate any deputy, and also was without jurisdiction to order the county to provide back pay to a discharged deputy.[2] Specifically, plaintiffs asserted that the sheriff's constitutional authority, Const 1963, art 7, §§ 4 and 6, and statutory authority to appoint deputies, MCL 51.70, superseded the authority the VPA granted to the PA under MCL 35.402. At a circuit court hearing on June 28, 2010, plaintiffs' counsel conceded this issue had not been raised before the PA. The circuit court ruled it would remand the matter to the PA to consider in the first instance whether the PA had subject matter jurisdiction of Kiessel's claim for reinstatement under the VPA. The court entered its order of remand on July 19, 2010.

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circumstances, [but] . . . this error in judgment is not the result of bad motives or malfeasance by Kiessel, but rather, the error was directly attributable to the lack of training he received while employed at the Sheriff Department [sic]."

[2] Kiessel filed a counterclaim for mandamus to enforce the PA's ruling.

On September 17, 2010, the PA issued another opinion and order, upholding his own jurisdiction under the VPA, confirming his original ruling in favor of Kiessel, and again ordering the sheriff to reinstate Kiessel with back pay. Alternatively, the PA ruled he had authority under the VPA to order the county, as Kiessel's coemployer, to reinstate Kiessel with back pay.

The circuit court heard oral arguments on the jurisdictional issue on November 12, 2010, and concluded that deputy sheriffs did not fall within the provisions of the VPA. The court reasoned that a sheriff's "power to appoint and revoke law enforcement powers . . . override all statutory and contract rights of the deputy." The court noted that although the sheriff's power to appoint and revoke the appointment of deputies was codified in MCL 51.70, it was of "constitutional magnitude and therefore cannot be overridden by a statute such as the Veterans Preference Act or any other statute." The circuit court also relied on *Abt v Wilcox*, 264 Mich 183; 249 NW 483 (1933), which held that the VPA does not protect a deputy appointed by a sheriff whose term has expired when a newly elected sheriff fails to reappoint the deputy. The circuit court reasoned that because the VPA does not apply to end-of-term reappointments, the sheriff's exercise of the plenary authority under MCL 51.70 was not subject to review under the VPA in other situations.

On December 9, 2010, the circuit court entered its order providing that "for the reasons stated on the record," the two orders the PA had issued regarding Kiessel "are hereby vacated." The same order denied Kiessel's motions for summary disposition. The circuit court denied reconsideration on January 10, 2011. Kiessel appeals by right.

III. ANALYSIS

This case presents issues of constitutional and statutory interpretation, which are both questions of law this Court reviews de novo. *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 312; 683 NW2d 148 (2004). MCL 51.70, on which the circuit court and plaintiffs rely, provides in pertinent part: "Each sheriff may appoint 1 or more deputy sheriffs at the sheriff's pleasure, and may revoke those appointments at any time." By its plain terms this provision contains no limit on the discretion of the sheriff to appoint and revoke the appointment of deputy sheriffs. But Kiessel argues that the VPA limits MCL 51.70 by providing that the sheriff may discharge deputies who are also honorably discharged veterans only for just cause.[3]

We first reject plaintiffs' argument that because the sheriff is a constitutional officer the Legislature may not limit the sheriff's common-law or statutory ability to discharge deputies at will. In *Bensinger*, 122 Mich App at 444, this Court noted that "the Legislature may not vary the duties and powers of the sheriff in a way which changes the legal character of the office." But this Court has also held that "the sheriff's power to hire, fire and discipline is not absolute." *Nat'l Union of Police Officers Local 502-M, AFL-CIO v Wayne Co Bd of Comm'rs*, 93 Mich App 76, 89; 286 NW2d 242 (1979). Indeed, our Constitution expressly confers on the Legislature the authority to prescribe the "duties and powers" of the sheriff. Const 1963, art 7, § 4 ("There shall be elected for four-year terms in each organized county a sheriff . . . whose duties and powers shall be

[3] The VPA provides that honorably discharged veterans may be removed, suspended, or transferred for "official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency . . . ." MCL 35.402.

provided by law."). Moreover, the Legislature has the authority to alter or abolish the common law. Const 1963, art 3, § 7; *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 546; 688 NW2d 550 (2004). Consequently, Michigan's Constitution does not preclude the Legislature from limiting the sheriff's authority to discharge deputies at will, whether that authority emanates from the common law or from statute.

Second, because nothing in the Constitution prevents the Legislature from limiting the sheriff's ability to discharge deputies at will, the issue presented in this case is one solely of statutory interpretation: Did the Legislature intend the VPA as an exception to a sheriff's authority under MCL 51.70 to appoint or remove a deputy at will, or did the Legislature intend that the VPA would not apply to honorably discharged veterans who are appointed sheriff's deputies? Although this is a close question, we conclude that appellant presents the better arguments regarding statutory construction: the Legislature intended the VPA to apply to all public employees who are honorably discharged veterans, including those appointed to the position of deputy sheriff.

While each party argues their side should prevail because the statute on which they rely is specific and the other general, the fact remains that the pertinent part of MCL 51.70 authorizing the sheriff to appoint deputy sheriffs and to revoke those appointments "at his pleasure," 1846 RS, ch 14, § 70 (amended 1847 PA 105, § 4), or "at any time," according to the modern version of MCL 51.70 as amended by 1978 PA 635, has remained essentially unchanged since its adoption in 1846. See *Local 1518, Council No 55, American Federation of State, Co & Muni Employees, AFL-CIO v St Clair Co Sheriff*, 407 Mich 1, 7; 281 NW2d 313 (1979). The

Legislature is presumed to be fully aware of both the common law, *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008), and existing statutes, *Craig v Detroit Pub Sch Chief Executive Officer*, 265 Mich App 572, 575; 697 NW2d 529 (2005). The Legislature enacted the VPA without an exception for deputy sheriffs. 1897 PA 205; MCL 35.401 *et seq*. Section 2 of the VPA, MCL 35.402, provides that honorably discharged veterans may be removed, transferred, or suspended from public employment only for cause, after written notice and a hearing, which in respect to county employees, must occur before the prosecuting attorney. The only exceptions to these requirements were added to the VPA by 1931 PA 67 for "heads of departments, members of commissions, and boards and heads of institutions appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments, heads of institutions and officers . . . ." These remain the only exceptions to the VPA. MCL 35.402; *Jackson v Detroit Police Chief*, 201 Mich App 173, 175; 506 NW2d 251 (1993).

The fact that the Legislature, pertinent to this case, has exempted only "first deputies" from the VPA logically implies that the VPA applies to other deputies. See *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). The provision of an exemption for only "first deputies" "eliminates the possibility of their [sic] being other exceptions under the legal maxim *expressio unius est exclusio alterius*." *Id*. This legal maxim means " '[t]he expression of one thing is the exclusion of another.' " *Id*. at 74 n 8, quoting Black's Law Dictionary (7th ed). Because the exception to the VPA for "first deputies"—which implies that regular deputies are protected by the VPA—was enacted after MCL 51.70 (see 1846 RS, ch 14, § 70, as amended by

1847 PA 105, § 4), the last enacted substantive provision, the VPA, as amended by 1931 PA 67, controls. This is so because "the Legislature is aware of the existence of the law in effect at the time of its enactments and recognizes that, since one Legislature cannot bind the power of its successor, existing statutory language cannot be a bar to further exceptions set forth in subsequent, substantive enactments." *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 713; 664 NW2d 193 (2003).

Additionally, the fact that the VPA is remedial in nature—for the benefit of honorably discharged veterans—also militates in favor of its application to sheriffs' deputies.[4] Remedial statutes are to be liberally construed in favor of the persons intended to be benefited. *Empson-Laviolette v Crago*, 280 Mich App 620, 629; 760 NW2d 793 (2008). The VPA was originally enacted for the benefit of Civil War veterans, but over the years was also extended to other honorably discharged veterans who had served this country during time of war or other "emergency condition." MCL 35.61; MCL 35.401; *Beadling v Governor*, 106 Mich App 530, 534-535; 308 NW2d 269 (1981). The VPA "was enacted for the purpose of discharging, in a measure, the debt of gratitude the public owes to veterans who have served in the armed services in time of war, by granting them a preference in original employment and retention thereof in public service." *Valentine v Redford Twp Supervisor*, 371 Mich 138, 145; 123 NW2d 227 (1963). Consequently, because the VPA "was passed for a commendable purpose," *Smith v Flint City Comm*,

[4] Cf. *Ellis v Common Council of Grand Rapids*, 123 Mich 567, 569; 82 NW 244 (1900) (referring to the VPA as a "penal statute" not subject to judicial expansion). As explained in *Beadling v Governor*, 106 Mich App 530, 535; 308 NW2d 269 (1981), the *Ellis* decision was superseded by statutory amendment, 1907 PA 329.

258 Mich 698, 700; 242 NW 814 (1932), it "should be liberally construed," *Abt*, 264 Mich at 185.

We also find unpersuasive plaintiffs' suggestion that the sheriff is not a "public department" as that term is used in the VPA. The right to a pre- or postdischarge hearing regarding removal, transfer, or suspension for cause extends only to an honorably discharged veteran "holding an office or employment in any public department or public works of the state or any county, city or township or village of the state . . . ." MCL 35.402. This language has been interpreted to mean all public employees, with the limited exceptions noted already.[5] *Jackson*, 201 Mich App at 175. Soon after the VPA was enacted, our Supreme Court differentiated the terms "public departments" from "public works" as used in the act. *Ellis v Common Council of Grand Rapids*, 123 Mich 567, 569; 82 NW 244 (1900). The Court defined "public department" as " 'a division of official duties or functions; a branch of government; a distinct part of a governmental organization: as, the legislative, executive, and judicial departments; the department of state, of the treasury . . . .' " *Id*. (citation omitted); see also *Beadling*, 106 Mich App at 535. It cannot be disputed that a sheriff and the sheriff's employees, colloquially known as a "sheriff's department," are " 'a distinct part of a governmental organization[.]' " *Ellis*, 123 Mich at 569 (citation omitted). Indeed, plaintiffs argue that a sheriff's common-law authority and prerogatives are so unique that they cannot be trifled with by the Legislature. Consequently, a sheriff and the sheriff's employees—a "sheriff's department"—is a "public department" within the meaning of the VPA because it is "an agency of the county." *Bayer v Macomb Co Sheriff*, 29 Mich App 171, 175; 185 NW2d 40 (1970).

[5] Plaintiffs concede this point in their brief on appeal.

As noted already, plaintiffs argue that Const 1963, art 7, § 4 imbues the sheriff as a constitutional officer with common-law powers that the Legislature may not limit, including the authority to discharge deputies at will. In *Allor v Wayne Co Bd of Auditors*, 43 Mich 76; 4 NW 492 (1880), the Court considered the propriety of the city of Detroit's not paying for services rendered by a constable in executing an arrest warrant issued by a justice of peace. The actual question was whether the power of the justices to issue process and the power of constables to serve process could be limited by the Legislature. *Id*. at 97. The Court held that when offices that have a known common-law legal character are established in our Constitution, the Legislature cannot "retain[] the names but destroy[] the powers of such officers" or "change those duties as to practically change the office." *Id*. at 102-103.[6] We applied *Allor* in *Brownstown Twp v Wayne Co*, 68 Mich App 244, 247-248; 242 NW2d 538 (1976):

> The office of sheriff is a constitutional office with duties and powers provided by law. Const 1963, art 7, § 4, *Labor Mediation Board v Tuscola County Sheriff*, 25 Mich App 159, 162; 181 NW2d 44 (1970). . . . The Legislature may vary the duties of a constitutional office, but it may not change the duties so as to destroy the power to perform the duties of the office.

In *Bensinger*, 122 Mich App at 444, citing *Allor* and *Brownstown Twp*, the Court opined "that the office of sheriff has a known legal character and . . . the Legislature may not vary the duties and powers of the sheriff in a way which changes the legal character of the office."

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[6] *Allor* was overruled in part on other grounds by *Averill v Bay City Justice of the Peace*, 74 Mich 296 (1889), as stated by *In re Slattery*, 310 Mich 458, 465-466 (1945).

At common law, the sheriff's duties were similar to that of constables, who were "the local peace officers of their vicinage, the ministerial officers of justices of the peace, and the bailiffs of courts of record of criminal jurisdiction in the county." *Allor*, 43 Mich at 103. "English sheriffs (or 'shire-reeves') were the King's 'reeves' (officers or agents) in the 'shires' (counties), at least after the Norman Conquest in 1066." *McMillian v Monroe Co*, 520 US 781, 793; 117 S Ct 1734; 138 LE2d 1 (1997). Thus, "[a]lthough chosen locally by the shire's inhabitants, the sheriff did 'all the king's business in the county,' and was 'the keeper of the king's peace.' " *Id*. (citations omitted). " 'In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government, he (the sheriff) represents the sovereignty of the State and he has no superior in his county[.]' " *Id*. at 794, quoting 1 Anderson, A Treatise on the Law of Sheriffs, Coroners and Constables, § 6, p 5 (1941). Our Supreme Court in *White v East Saginaw*, 43 Mich 567, 570; 6 NW 86 (1880), quoting *People v Edwards*, 9 Cal 286 (1858), described the sheriff's common-law duties as including, " 'the execution of the orders, judgments, and process of the courts; the preservation of the peace; the arrest and detention of persons charged with the commission of a public offense; the service of papers in actions,' " and being " 'more or less directly connected with the administration of justice . . . .' " And, in *Brownstown Twp*, 68 Mich App at 249, the Court observed:

> Michigan has codified the common law duties of the sheriff with little variance. For instance, sheriffs may execute all lawful orders and process of the circuit courts of this state. MCLA 600.582. Sheriffs have charge and custody of the county jail and its prisoners. MCLA 51.75. Likewise, statutory law impliedly recognizes the duty of

> the sheriff to serve process in civil or criminal cases, preserve the peace, and apprehend persons committing a felony or a breach of the peace, because the sheriff may recruit suitable aid in performing these functions. MCL 600.584. [Citations omitted.]

Plaintiffs cite no authority for the proposition that the sheriff's statutory ability to discharge deputies without cause was among the common-law powers of the sheriff. But even assuming that the common law recognized that the sheriff had such power, plaintiffs present no meaningful argument that the power of discharge without cause is essential to the common-law legal character of the office of sheriff, or that its legislative regulation would destroy the powers of the sheriff to perform the known common-law "duties and powers of the sheriff in a way which changes the legal character of the office." *Bensinger*, 122 Mich App at 444. If the sheriff's discretion to appoint and remove deputies at will is purely statutory, then surely pursuant to its constitutional authority, Const 1963, art 7, § 4 (the sheriff's "duties and powers shall be provided by law"), the Legislature may impose reasonable limitations on the statutory authority of the sheriff to appoint and remove deputies at will.

The Michigan Sheriffs' Association, as amicus curiae, does cite authority in support of plaintiffs' position that a sheriff's common-law authority includes appointing and removing deputies at will, specifically, 1 Anderson, Sheriffs, Coroners and Constables, §§ 60, 85, and 145, pp 55-56, 76-77, and 142. In *Rucker v Harford Co*, 316 Md 275, 290; 558 A2d 399 (1989), Maryland's highest court, in concluding that a sheriff and deputy sheriffs were state officials, cited the same authority and opined, "[a]mong the common-law powers and duties of a sheriff was the duty to appoint, direct, and remove deputies." We observe that the *Rucker* Court also noted

that "[t]hese common law duties have been regulated somewhat by the [Maryland] General Assembly. Thus, statutes prescribe the number of deputies a sheriff may hire, mandate the training deputies are to receive, and limit a sheriff's power to fire a deputy at will." *Id*. at 290-291 (citations omitted).

As noted already, our Constitution authorizes the Legislature to alter or abolish the common law. Const 1963, art 3, § 7. And both this Court and our Supreme Court have recognized the Legislature's authority to place reasonable limits on the statutory authority of sheriffs under MCL 51.70 to appoint and remove deputies at will. See *Locke v Macomb Co*, 387 Mich 634, 639; 199 NW2d 166 (1972) (holding that an act adopted by the Legislature establishing a civil service system for sheriffs' departments in certain counties, MCL 51.351 *et seq*., superseded MCL 51.70); *Cyrus v Calhoun Co Sheriff*, 85 Mich App 397, 400; 271 NW2d 249 (1978) (holding that MCL 338.1726(2), prohibiting discharge based solely on the results of a polygraph test, limited a sheriff's authority under MCL 51.70); *Nat'l Union of Police Officers*, 93 Mich App at 83-89 (holding that the sheriff's power to hire, fire, and discipline deputies under MCL 51.70 may be limited by a collective bargaining agreement [CBA] entered into under the public employment relations act [PERA], MCL 423.201 *et seq*.); and *Bensinger*, 122 Mich App at 444-446 (upholding an arbitration ruling that had ordered the reinstatement with back pay of a fired deputy but had not required that the sheriff delegate any law enforcement powers to the reinstated deputy), following *Nat'l Union of Police Officers*.

Although this Court has recognized the Legislature's authority to reasonably limit the sheriff's statutory authority to appoint and remove deputies at will, it also

has respected the sheriff's exercise of discretion regarding the manner in which the sheriff performs his or her duties and to whom the sheriff delegates his or her law enforcement powers. In *Labor Mediation Bd*, 25 Mich App at 161-162, the Court addressed the issue of the enforcement, under § 16 of PERA, MCL 423.216, of a decision finding the sheriff guilty of an unfair labor practice in discharging a deputy and ruling that the deputy should be reinstated with back pay as a road patrol officer. The Michigan Labor Mediation Board would not accept the sheriff's offer to reinstate the deputy "at his former pay, with the same hours, same leave, and any other fringe benefits," but assign him "to the duties of turnkey of the jail." *Id*. at 161. This Court observed that "for the sheriff to conduct his office in an orderly fashion, it is necessary for him to determine which deputy shall be assigned to certain duties." *Id*. at 164. This Court held that the sheriff's compromise complied with the labor board's original ruling, opining:

> It is not the prerogative of deputies to choose their duties . . . . Inasmuch as the sheriff is the chief police officer having to do with law enforcement in the county, he should not be hampered in his administration of the office by any agency or board as to the actual assignment of duties to be performed by a sheriff's deputy. [*Id*.]

The Court in *Nat'l Union of Police Officers*, 93 Mich App at 89, employed similar reasoning and compromise between the sheriff's discretionary law enforcement duties and limitations placed on the sheriff's statutory authority to revoke the appointment of a deputy. The Court held that "the sheriff's power to hire, fire and discipline is not absolute" and "is limited by PERA." *Id*. Nevertheless, the Court held "the matter of which of [the sheriff's] deputies shall be delegated the powers of law enforcement entrusted to him by the constitution is

a matter exclusively within [the sheriff's] discretion and inherent in the nature of his office, and may neither be infringed upon by the Legislature nor delegated to a third party." *Id*. (citations omitted). In *Bensinger*, an arbitrator, appointed pursuant to a CBA grievance procedure, ordered the reinstatement with back pay of a discharged deputy sheriff. The circuit court upheld the arbitrator's order except that the sheriff was not required to reinstate the deputy's law enforcement powers. The *Bensinger* Court affirmed the circuit court, opining "*Nat'l Union of Police Officers* represents a delicate balancing of the constitutional roles of the sheriff and the Legislature and no convincing reason to disturb that balance has been presented here." *Bensinger*, 122 Mich App at 445-446.

Plaintiffs also argue that the prosecutor's review under the VPA of a sheriff's exercise of discretion to appoint or remove deputies would be unconstitutional under the separation of powers doctrine, citing *Beadling*, 106 Mich App at 536-537. That case held that Const 1963, art 3, § 2 would not permit the Governor to review, under the VPA, the Legislature's discharge of one of its employees.[7] "The concept of separation of powers would be violated if the executive branch was [sic] allowed to judge the competency of a discharged employee of the legislative branch and order reinstatement." *Beadling*, 106 Mich App at 536. The constitutional principle of the separation of powers does not apply to one executive branch officer (the prosecutor) reviewing whether another executive branch officer (the sheriff) complied with MCL 35.402, limiting the

[7] Const 1963, art 3, § 2 states, "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

removal, transfer, or suspension of honorably discharged veterans.

Finally, the reliance of plaintiffs and amicus curiae on *Abt v Wilcox*, 264 Mich 183, and *Washington ex rel Day v King Co*, 50 Wash 2d 427; 312 P2d 637 (1957), is misplaced. In *Abt*, our Supreme Court held that a deputy sheriff, an honorably discharged veteran who had been appointed by a sheriff whose term had expired, did not have a right under § 2 of the VPA to be reinstated as a deputy of the new sheriff. The Court opined, "[i]f we concede . . . that the office of sheriff is a 'public department' . . . and that a deputy sheriff could not be removed or suspended without cause by the sheriff during his term of office, it does not follow that the appointment does not terminate on the expiration of the term to which the sheriff has been elected." *Abt*, 264 Mich at 185. The Court concluded that the deputy's "term of office expired . . . with that of the sheriff who appointed him, and the order denying the writ of mandamus to reinstate him is affirmed." *Id*. at 186. The *Day* case, similar to *Abt*, involved deputies of a former sheriff seeking to compel reappointment by the newly elected sheriff under that state's VPA. *Day*, 50 Wash 2d at 427-428. The Court held that "[t]he deputies of the former sheriff . . . cannot tie the hands of succeeding sheriffs." *Id*. at 430. Neither *Abt* nor *Day* has any application to the facts of this case, which involves the midterm discharge of a deputy by the appointing sheriff.

The other issues the parties discuss are rendered moot by our conclusions that the VPA is constitutional as applied to deputy sheriffs and is a reasonable restriction on the otherwise absolute discretion conveyed to sheriffs by MCL 51.70. In addition, although the parties argue the merits of the prosecutor's ruling, the circuit

court has yet to address them. Accordingly, we vacate the writ of superintending control and remand to the circuit court to consider in the first instance the merits of plaintiffs' appeal of the prosecutor's order. We do not retain jurisdiction. Because a question of public policy was involved, no costs are taxable under MCR 7.219.

MARKEY, P.J., and BECKERING and M. J. KELLY, JJ., concurred.

MAJESTIC GOLF, LLC v LAKE WALDEN COUNTRY CLUB, INC

Docket No. 300140. Submitted December 7, 2011, at Lansing. Decided July 10, 2012, at 9:00 a.m. Leave to appeal granted, 493 Mich 958.

Majestic Golf, LLC, filed an action in the Livingston Circuit Court against Lake Walden Country Club, Inc., seeking to enforce a forfeiture clause in the parties' commercial real-estate lease. Plaintiff (as the successor in interest of Waldenwoods Properties, LLC, the original owner and developer of the property in issue) developed a plan to build a golf course surrounded by a residential development on land it owned. In 1992, plaintiff (as landlord) and defendant (as tenant) entered into a 25-year lease agreement that required defendant to pay rent to plaintiff for use of the underlying land on which defendant would construct a 27-hole golf course and plaintiff would develop the surrounding land into residential real estate. Defendant built and operated the golf course, but plaintiff never started construction on the residential development. The parties began merger negotiations in March 2003 that continued until the present litigation. The contract required defendant to consent to roadway-crossing easements to accommodate the proposed residential development. Beginning in 2006, plaintiff notified defendant of its need for defendant to grant the road-crossing easements. Plaintiff sent a letter to defendant on October 7, 2008, detailing defendant's obligations under the lease regarding the road-crossing easements and requesting that defendant fulfill its obligations by signing and returning the consent of grant of easement within 30 days. Plaintiff's attorney sent a letter to defendant on November 24, 2008, stating that defendant's continued failure to execute the consent to the grant of easements constituted a default under the terms of the contract and exercising plaintiff's right to terminate the lease effective immediately. On December 11, 2008, defendant indicated that it would treat the November letter as the required 30-day notice to terminate the lease. On December 22, 2008, defendant's attorney informed plaintiff by letter that defendant was exercising its option under the lease to purchase the golf course property and this action ensued. Both parties moved for summary disposition, which the court, Michael P. Hatty, J., granted in part and denied in part, holding that defendant defaulted under the terms of the lease

because it failed to agree to the requested easements and that the October 7, 2008, letter constituted the requisite notice that defendant had not fulfilled its obligations under the lease. The court refused to enforce the forfeiture clause of the lease, however, concluding that it would be inequitable to terminate the lease because the breach was not material. Plaintiff appealed and defendant cross-appealed.

The Court of Appeals *held*:

1. A contract must be interpreted according to its plain and ordinary meaning. When contractual language is unambiguous it must be enforced as written unless it violates the law, is contrary to public policy, or is unenforceable under traditional contract defenses. The lease was unambiguous and provided that plaintiff could cancel and terminate the lease if defendant failed to comply with any obligation (other than the payment of rent) and the failure to perform continued for 30 days after defendant was formally notified of the failure to perform. Plaintiff's October 7, 2008, letter notified defendant of its obligation under the lease to grant the road-crossing easements and that it had 30 days to cure its nonperformance. The court properly determined that defendant breached the lease when it failed to agree to the easements as required by the terms of the lease.

2. A court may not ignore a contract's plain and unambiguous terms on the basis that they are unreasonable. Rescission is an equitable remedy that is used to terminate a contract and places the parties in their original position, even if restitution is necessary. In contrast, forfeiture is that which is lost, or the right to which is alienated, by a breach of contract and terminates an existing contract without restitution. The breach of a covenant does not justify the cancellation of an entire contract unless there is a provision in a contract clearly and expressly allowing forfeiture. Only recognized traditional contract defenses, like duress, waiver, estoppel, fraud, and unconscionability may be used to avoid the enforcement of a legal forfeiture clause. Procedural and substantive unconscionability must be present for a contract or a contract provision to be found unconscionable. Procedural unconscionability occurs when the weaker party was not free to accept or reject the disputed contract term. A contract provision is substantively unconscionable when its inequity is so extreme that is shocks the conscience. The court erred by ignoring the clear and unambiguous forfeiture clause by reforming the contract to include the term "material breach." The equitable remedy of rescission was not applicable to this case because the lease provided that it could be terminated if defendant failed to fulfill any of the

requisite lease obligations. Exceptional circumstances did not exist that would justify ignoring the plain language of the lease. The forfeiture clause did not violate the law and it was not contrary to public policy. In addition, the forfeiture clause was not avoidable under the unconscionability doctrine because it was neither procedurally nor substantively unconscionable. There was no evidence that defendant was in a weaker position than plaintiff and had been forced to accept the forfeiture term. The advantage given to plaintiff by the contract did not shock the conscience. The lease gave defendant 30 days to cure any breach before the lease would be terminated and under these circumstances the clause was not substantively unreasonable.

3. Plaintiff successfully invoked the default provision of the contract and terminated the lease on November 24, 2008. Because plaintiff's termination of the lease extinguished defendant's option to purchase the land on which the golf course was developed, defendant's attempt to exercise the Lease's option-to-purchase provision on December 22, 2008, was void. The court's decision would not be reversed because it reached this same result but for the wrong reason.

4. Defendant was not excused from its obligation to consent to the easement agreement. There was no evidence that its refusal to consent was based on an objection to the location of the proposed easements and its failure to consent was a breach of the plain and unambiguous terms of the lease. There was no evidence to support defendant's assertion that its consent to the road easement was not required because it was contingent on finalization of the merger agreement or it was not ripe because certain unwritten conditions had not been met.

5. The October 7, 2008, letter satisfied the notice requirements of the lease. The record did not support defendant's claim that the letter was not sent via registered mail. The lease did not require written notice to contain specific words, the letter referred to defendant's continuing obligation under the lease to provide the consent and established a 30-day time period to cure the defect, which matches the time period requirement set forth in the forfeiture clause.

Affirmed in part, reversed in part, and remanded for further proceedings.

CONTRACTS — BREACH OF CONTRACTS — FORFEITURE — AVOIDANCE OF FORFEITURE — UNCONSCIONABLE.

A court may not ignore a contract's plain and unambiguous terms on the basis that they are unreasonable; forfeiture is that which is

lost, or the right to which is alienated, by a breach of contract and terminates an existing contract without restitution; breach of a covenant does not justify the cancellation of an entire contract unless there is a provision in a contract clearly and expressly allowing forfeiture; only recognized traditional contract defenses, like duress, waiver, estoppel, fraud, and unconscionability may be used to avoid the enforcement of a legal forfeiture clause; procedural and substantive unconscionability must both be present for a contract or a contract provision to be found unconscionable; procedural unconscionability occurs when the weaker party was not free to accept or reject the disputed contract term; a contract provision is substantively unconscionable when its inequity is so extreme that is shocks the conscience.

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McClelland & Anderson, LLP (by *Gregory L. McLelland* and *Melissa A. Hagen*), for Lake Walden Country Club, Inc.

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

WILDER, P.J. In this case involving a commercial real-estate contractual relationship, plaintiff, Majestic Golf LLC, appeals as of right from an opinion and order granting it summary disposition in part and denying it summary disposition in part. Defendant, Lake Walden Country Club, Inc., cross-appeals as of right from the same order. We affirm in part, reverse in part, and remand.

I. BASIC FACTS

In 1991, Waldenwoods Properties, L.L.C. (WPL) started planning for a "golf course-real estate development" on approximately 1,400 acres of land it owned. As planned, the golf course was to be constructed on approximately 400 acres, and residential properties

were going to surround the golf course. WPL planned to lease the land for the golf course ("the Golf Property" or "the Premises") to a different entity that would be responsible for constructing and operating the golf course.

On December 8, 1992, WPL (as landlord) and defendant (as tenant) entered into a lease agreement (the Lease) for a period of 25 years. The Lease contained the following relevant paragraphs:

> **17. OPTION TO PURCHASE**. Tenant is hereby granted an exclusive option to purchase the Premises on the following terms and conditions:
>
> A. The option shall be exercisable at any time during the final ten (10) years of the Lease term, excluding however the final six (6) months.
>
> B. Exercise of the option shall be in writing, delivered to Landlord.
>
> C. The option may be exercised only if Tenant is not in default of this Lease at the time of exercise.
>
> D. The price shall be determined by appraisal of the fair market value of the Premises as of the date of exercise of the option, but in the condition and state they are in as of the date of executing this Lease, with the assumption they are not subject to this Lease and are restricted to golf course use.
>
> * * *
>
> H. Each party at its own expense shall retain an appraiser within thirty (30) days after the option is exercised. Within ninety (90) days after the option is exercised, the parties shall exchange appraisals. If the higher is no more than Ten Percent (10%) higher than the lower, the average of the two (2) shall be the purchase price. If the higher is more than Ten Percent (10%) higher than the lower, the two appraisers within thirty (30) days shall select a third appraiser who shall review the two (2)

appraisals and within an additional (30) days determine the purchase price, which shall be no less than the lower appraisal and no higher than the higher appraisal. The cost of the third appraiser shall be borne equally by the parties.

* * *

K. If this Lease terminates for any reason prior to Tenant exercising its option to purchase, the option shall automatically terminate on termination of the Lease.

* * *

22. LANDLORD'S EASEMENTS AND ROAD CROSSINGS. Tenant shall permit drainage and utility easements and road crossings to be developed by Landlord on the Premises as required to permit development to occur on Landlord's Other Real Estate. The easements and crossings shall be installed by Landlord at its expense but located in areas mutually agreeable. The utilities and roads shall be installed in such a manner as to ensure that the integrity of the golf course in [sic] preserved, leaving the golf course in equal or better condition.

* * *

26. DEFAULT. Each of the following events shall be a default hereunder by Tenant and a breach of this Lease.

* * *

D. If Tenant shall fail to perform any of the agreements, terms, covenants, or conditions hereof on Tenant's part to be performed (other than payment of rent) and such non-performance shall continue for a period within which performance is required to be made by specific provision of this Lease, or if no such period is so provided for, a period of thirty (30) days after notice thereof by Landlord to Tenant, or if such performance cannot be reasonably had within such thirty (30) day period, Tenant shall not in good

> faith have commenced such performance within such thirty (30) day period and shall not diligently proceed therewith to completion;
>
> * * *
>
> If any event specified above shall occur and be continuing, Landlord shall have the right to cancel and terminate this Lease, as well as all of the right, title and interest of Tenant hereunder.
>
> * * *
>
> **31. NOTICES**. Whenever it is provided herein that notice, demand, request, or other communication shall or may be given to or served upon either of the parties by the other, and whenever either of the parties shall desire to give or serve upon the other any notice, demand, request, or other communication with respect hereto or with respect to the Premises, each such notice, demand, request, or other communication shall be in writing and, any law or statute to the contrary notwithstanding, shall be effective for any purpose if given or served as follows:
>
> A. If by Landlord, by mailing the same to Tenant by registered mail, postage prepaid, return receipt requested, addressed to Tenant at 4662 Okemos Road, Okemos, Michigan 48864, or at such other address as Tenant may from time to time designate by notice given to Landlord by registered mail.

At the time the Lease was originally signed, both parties anticipated the construction of the "golf-real estate development." Defendant was to develop the then-undeveloped Golf Property into 27 golf course holes, and WPL was to develop the surrounding land into residential real estate.

Defendant complied with its obligation under the Lease to construct the 27-hole golf course. Plaintiff has not yet initiated construction on the residential real

estate. Defendant had paid rent in a timely manner and fully complied with its other obligations under the Lease until the instant litigation commenced.

According to defendant, it has invested more than $6 million in the Golf Property and has paid over $1.6 million in rent to plaintiff. According to Frank Crouse, a manager of both WPL and plaintiff, defendant recovered its investment in the Golf Property within the first six years.

In March 2003, defendant and WPL (later, plaintiff, as WPL's successor in interest), began merger negotiations. In the potential merger, defendant was to transfer all of its interest in the Golf Property to plaintiff in exchange for an 85 percent membership interest in plaintiff. These merger negotiations continued until the present litigation began.

On October 27, 2006, Crouse (as manager of WPL) sent a letter to Pat Hayes, defendant's president. In this letter, he discussed the status of the ongoing merger negotiations and also discussed the status of the zoning approval process for WPL's "Master Plan" for development. He listed six necessary points of agreement for a successful merger and approval of the Master Plan. The fifth point of agreement required defendant's approval of a "road easement" between holes #21 and #22 (the Road Easement). WPL needed defendant's approval of the Road Easement to obtain Hartland Township's final approval of WPN's Master Plan.

On April 3, 2007, WPL conveyed title to the Golf Property to plaintiff,[1] thereby making plaintiff the successor in interest to WPL's interest in the Golf Property. But WPL continued to own the land surrounding the Golf Property. On April 26, 2007, plaintiff

[1] WPL is the only member of plaintiff.

presented to defendant a document titled "Consent to Grant of Easements." This "Consent" document was styled as a formal contract, and it included detailed maps and descriptions of the Road Easement.

On June 1, 2007, Crouse met with defendant's representatives to discuss the proposed merger and proposed Master Plan. According to the summary of the meeting, defendant reviewed plaintiff's proposed Road Easement and suggested certain changes. According to Crouse, none of defendant's suggested changes addressed the Road Easement's location.

On June 19, 2007, Crouse sent an e-mail to James Hile (a representative of defendant). The e-mail stated that Doug Austin would make "the appropriate changes previously agreed to" for the Road Easement. Crouse reminded Hile that defendant's consent to the Road Easement was necessary for approval of the Master Plan.

According to Crouse, a revised version of the Road Easement was delivered to defendant on November 5, 2007, for defendant's consent. According to Crouse, the revised version incorporated some of defendant's recommended changes to the Road Easement, although the location of the easement remained the same.

The discussions between plaintiff and defendant continued and finally culminated in a letter dated October 7, 2008, from Crouse to Hayes that read as follows:

> I am writing on behalf of both Waldenwoods Properties, LLC [WPL] and Majestic Golf, LLC to request that you execute the Consent portion of the enclosed Grant of Easement and return it to me for recording. As you will recall, Section 22 of the golf course lease obligates Lake Walden to permit road crossing easements when required by Waldenwoods for development of its adjoining land. Sometime ago Waldenwoods requested a crossing easement

> from Majestic Golf, which owns the golf course land. Majestic Golf approved the request, and on that basis a proposed easement between Majestic and Waldenwoods was sent to Lake Walden on April 26, 2007 for review and consent.
>
> Following receipt and review of the document, you requested some changes. Those were made, and the document was resubmitted to golf course management with a request to execute the Consent. This occurred, I believe, late in 2007. Despite the request, the written Consent has not been received. Concurrence by Lake Walden is urgently required.
>
> I am requesting that Lake Walden fulfill its obligation under the lease. Please sign and return the enclosed Consent within thirty (30) days.

The next day, on October 8, 2008, Crouse sent an e-mail to both Hile and Hayes, which stated in relevant part:

> While we still very much hope that a cooperative merger will take place, we have found it necessary to prepare for the circumstance that it may not, because the differences are found to be irreconcilable. . . .
>
> If an agreement cannot be reached, then we may be presented with a notice by Lake Walden of its intent to exercise the purchase option included in our lease. Accordingly, we are providing the following attachments.
>
> * * *
>
> **Attachment 2 - A letter requesting Concurrence by Lake Walden in the crossing easement**, that has been in process since early 2007. The crossing easement has not changed – hence the legal descriptions finalized by Desine Inc.[ ]are dated 3/9/2007. We received approval subject to modifications to meet certain LWCC objections, and have previously asked for your concurrence, which has not be[en] provided as is required by Section 22 of the Lease. Failure to obtain Lake Walden concurrence was a major

> reason why we were not able to finalize a Master Plan for our property. Now we again request that Lake Walden promptly fulfill its obligation under the lease.
>
> * * *
>
> ***We do not intend any of these items to be interpreted that we do not wish to successfully conclude a merger*** – as you recall, it is WPL that has attempted to have this matter continue to receive consideration. ***We are still hopeful that this process will be successful.***

According to Crouse, on November 10, 2008, defendant presented plaintiff with defendant's revised merger documents. These documents continued to claim that consent to the Road Easement was contingent upon finalization of the merger. Crouse stated that these documents were unreasonably one-sided in favor of defendant.

On November 24, 2008, legal counsel for plaintiff sent a letter to defendant that stated in relevant part:

> The refusal of Lake Walden Country Club, Inc. to execute and deliver the Consent to the Grant of Easements sent to you on October 6, 2008 [sic — October 7, 2008] constitutes a default under the provisions of Paragraph 26 D of the Lease. On account of this default, Majestic Golf, LLC is hereby exercising its right under Paragraph 26 to terminate the Lease, effective immediately. Because of this termination, all rights granted to Lake Walden Country Club, Inc. to purchase the property pursuant to Paragraph 17 K of the Lease are also terminated, effective immediately.

On December 11, 2008, counsel for defendant sent a responding letter to plaintiff. Defendant's counsel stated that it was always the parties' intent to execute the Road Easement at the merger closing. He further stated that defendant was interpreting the November 24, 2008, letter as the formal 30-day notice required

under the Lease. He included defendant's revised version of the Grant of Easement and concluded by stating that defendant would agree to the new terms of the Grant of Easement to comply with the Lease. The revised documents were unsigned. In fact, defendant never signed any document to consent to plaintiff's Road Easement.

On December 22, 2008, counsel for defendant sent another letter to plaintiff, informing plaintiff that defendant was exercising its option to purchase the Golf Property under ¶ 17 of the Lease. Defendant stressed that under the terms of the Lease each party must obtain an appraisal. The parties both procured appraisals. Plaintiff's appraisal value of the Golf Property was $800,000, and defendant's effective market value of the Golf Property was zero dollars.[2]

Plaintiff filed its first amended complaint on May 21, 2009. Count I sought specific performance of ¶ 29 of the Lease, which required defendant to vacate the Golf Property upon termination of the Lease. Count II sought a declaratory order stating that defendant's attempt to exercise the option to purchase under ¶ 17 of the Lease was invalid because the Lease had terminated before defendant's attempt to exercise the option. Count III sought a stay of the 90-day appraisal period stated in ¶ 17 of the Lease, pending the trial court's resolution of the other issues of the case. Count IV sought a declaratory judgment and order for payment for defendant's reasonable rental value of the Golf Property during the case. Count V sought a declaratory judgment that defendant's option to purchase was void because defendant's appraisal of zero dollars was submitted in bad faith.

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[2] Defendant explains that this value was derived using the appraisal instructions in the Lease.

Defendant filed its counterclaim on June 26, 2009. Count I sought specific performance of the appraisal and option to purchase provisions of ¶ 17 of the Lease. Count II sought a declaratory order stating that (1) defendant did not breach the Lease, and (2) defendant properly exercised the option to purchase on December 22, 2008.

Defendant moved for summary disposition under both MCR 2.116(C)(8) and MCR 2.116(C)(10) on August 27, 2009. Plaintiff, without citing a court rule, countered by moving for summary disposition on September 24, 2009.

The trial court, while applying only MCR 2.116(C)(10), issued its opinion and order on December 23, 2009. It identified three issues:

> The first issue is whether or not [defendant] defaulted on the lease after receiving notice of non-compliance with an obligation and an opportunity to cure that non-compliance via the Crouse letter on October 7, 2008. The second is whether, if [defendant] defaulted, such default warranted termination of the lease and, by extension, termination of their option to purchase the subject property. The final issue is whether, if [defendant] did properly invoke its option, either or both of the appraisals should be stricken by the Court as failing to comply with the appraisal procedures defined by ¶ 17(D) of the lease.

The trial court first held that defendant defaulted under the terms of the Lease. It explained that ¶ 22 of the Lease obligated defendant to agree to the requested easements. It further explained that the October 7, 2008, letter provided the requisite notice under ¶ 26 of the Lease, stating:

> It is inconsequential that the October 7 letter did not call itself notice or reference an existing default. As the plaintiff argues, a default did not exist until after 30 days of

> non-performance following the transmission of this letter. Further, the terms of the lease do not require that the notice label itself as such but require only that the landlord inform the tenant that it has not performed an obligation under the lease, which this letter did. The October 8 e-mail from Crouse to Pat Hayes and James Hile does not contextualize away the sufficiency of this notice either but rather bolsters it. Although Crouse does express a desire to continue the negotiations, he also recites in the e-mail the defendant had not fulfilled its obligation under ¶ 22 of the lease and reiterates his request that the defendant do so. Finally, the allegation that the parties had agreed to another period for performance of this consent to easement is similarly immaterial. The obligation to permit easements is stated in mandatory language, and the time of performance is only contingent upon a mutually agreeable location being chosen. The lease itself under ¶ 43 limits modification of its terms by requiring a written instrument executed by both parties. Therefore, what the parties agreed orally as to when performance would occur was irrelevant since the plaintiff had a right to demand performance under the lease.

The trial court held that, because defendant did not provide its consent to the requested easements within 30 days of receiving the October 8 letter, defendant breached the Lease.

The trial court then held that termination of the Lease was not proper under principles of equity. The trial court concluded that termination was not warranted because defendant's breach was not material. It reasoned that defendant had invested over $6 million in the Golf Property and had paid its rent in a timely manner. The trial court also reasoned that any wrongful withholding of consent to the easement would be compensable in money damages. Thus, the trial court concluded that forfeiture of the Lease would be "unduly harsh and oppressive."

The trial court declined to address the third issue. It noted that defendant did not properly exercise the option under ¶ 17 because it breached the Lease before its attempt to exercise the option. The trial court concluded its opinion as follows:

> 1. As to Count I of the plaintiff's complaint seeking an order that the defendant surrender the lease premises, the defendant's motion for summary disposition is GRANTED. Because there is no genuine issue of material fact and the defendant's breach was not material, the plaintiff cannot succeed on that claim.
>
> 2. With respect to Count II of the plaintiff's complaint, the plaintiff's motion for summary disposition is GRANTED in part since the defendant's attempt to exercise their option to purchase was ineffective as a result of the defendant's default. However, because the defendant's breach was not material, the option has not indefinitely lapsed.
>
> 3. Consistent with this ruling, summary disposition is GRANTED in favor of defendant as to Count V of plaintiff's complaint and in favor of plaintiff as to Count I of the defendant's counter-complaint.
>
> 4. Finally, with respect to Counts III and IV of the plaintiff's complaint, the defendant's motion is DENIED. Count III was previously disposed of by the Court in issuing a preliminary injunction, and Count IV is not germane to the instant motion.

On January 22, 2010, plaintiff moved for reconsideration. Plaintiff urged the trial court to reconsider its holding that equitable considerations prohibited plaintiff from terminating the Lease. Plaintiff also urged the trial court, as a procedural matter, to dismiss count IV of plaintiff's first amended complaint without prejudice. On March 31, 2010, the trial court declined to reconsider the substance of its previous order. However, the trial court agreed to dismiss count IV without prejudice.

On August 23, 2010, the parties stipulated to dismissal of count II of defendant's counter-complaint, which resolved the final issue and closed the case.

II. ANALYSIS

We review de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

Issues involving either contractual interpretation or the legal effect of a contractual clause are reviewed de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). "When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo." *Id*.

A. PLAINTIFF'S APPEAL

Plaintiff first argues that the trial court improperly utilized the "material breach doctrine" in deciding whether plaintiff could invoke the forfeiture clause in the Lease. We agree.

"A contract must be interpreted according to its plain and ordinary meaning." *Alpha Capital Mgt v Rentenbach*, 287 Mich App 589, 611; 792 NW2d 344 (2010). When "contractual language is unambiguous and no reasonable person could differ concerning application of the term or phrase to undisputed material facts, summary disposition should be awarded to the proper party." *Id*. at 612.

The forfeiture clause is located in ¶ 26 of the Lease and provides as follows:

> **26. DEFAULT**. Each of the following events shall be a default hereunder by Tenant and a breach of this Lease.
>
> * * *
>
> D. If Tenant shall fail to perform any of the agreements, terms, covenants, or conditions hereof on Tenant's part to be performed (other than payment of rent) and such non-performance shall continue for a period within which performance is required to be made by specific provision of this Lease, or if no such period is so provided for, a period of thirty (30) days after notice thereof by Landlord to Tenant, or if such performance cannot be reasonably had within such thirty (30) day period, Tenant shall not in good faith have commenced such performance within such thirty (30) day period and shall not diligently proceed therewith to completion;
>
> * * *
>
> If any event specified above shall occur and be continuing, Landlord shall have the right to cancel and terminate this Lease, as well as all of the right, title and interest of Tenant hereunder.

Thus, according to the plain and unambiguous terms of the Lease, plaintiff could "cancel and terminate" the Lease if defendant failed to comply with *any* obligation

(with the exception of the failure to pay rent) and that failure to perform continued for 30 days after defendant was formally notified, pursuant to ¶ 31 of the Lease, of the failure to perform.

As we discuss later in this opinion when we discuss defendant's cross-appeal, we conclude that there is no question of fact that the October 7, 2008, letter complied with the notice requirements of ¶ 31 of the Lease. Therefore, to avoid defaulting under the terms of the Lease, defendant had 30 days from October 8, 2008, to cure its non-performance. The record is clear that defendant did not respond to plaintiff's letter by November 7, 2008. Therefore, under the plain language of ¶ 26, the default occurred on or about November 7, 2008. The trial court correctly reached this conclusion.

Defendant, however, asserts that plaintiff breached the contract first when it recorded a document in the Livingston County Register of Deeds in February 2008. But defendant does not explain what covenant of the Lease plaintiff allegedly violated and also does not provide any authority in support of why this alleged "breach" prevented plaintiff from adhering to other aspects of the Lease. "An appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for his or her claims." *In re Temple Marital Trust*, 278 Mich App 122, 139; 748 NW2d 265 (2008). Consequently, we decline to consider defendant's argument.

Even though the trial court correctly found that defendant breached the Lease, the trial court refused to allow plaintiff to terminate the Lease because it concluded under the "material breach doctrine" that forfeiture of a lease pursuant to a termination clause is not warranted when the breaching party committed an

immaterial breach. We hold that the trial court erred by not applying the plain language of the contract.

This Court has not, in a published opinion, addressed the applicability of the material breach doctrine when the contract at issue contains an express forfeiture clause. Before addressing that question directly, we first note that there is a difference between "rescission," "termination," and "forfeiture" of a contract. Rescission is an equitable remedy that is used to avoid a contract. See *Alibri v Detroit/Wayne Co Stadium Auth*, 254 Mich App 545, 555; 658 NW2d 167 (2002), rev'd on other grounds 470 Mich 895 (2004); Black's Law Dictionary (9th ed).

> Generally, to rescind a contract means to annul, abrogate, unmake, cancel, or avoid it. More precisely, rescission amounts to the unmaking of a contract, or an undoing of it from the beginning, and not merely a termination.
>
> The word "termination" generally refers to an ending, usually before the end of the anticipated term of the contract. Rescission of a contract constitutes termination of that contract with restitution. On the other hand, a forfeiture, properly exercised, terminates a contract without restitution. [17B CJS, Contracts, § 585, pp 18-20 (footnotes omitted).]

In addition:

> A forfeiture is that which is lost, or the right to which is alienated, by a breach of contract. *Unless there is a provision in a contract clearly and expressly allowing forfeiture*, breach of a covenant does not justify cancellation of the entire contract, and courts will generally uphold a forfeiture only where a contract *expressly provides for it*.
>
> The declaration of a forfeiture for the breach of a condition of a contract, in accordance with a stipulation therein, is to be distinguished from a rescission of the contact in that it is an assertion of a right growing out of the contract; if it puts an end to the contract and extin-

> guishes it in accordance with its terms similarly to the manner in which it is extinguished by performance. Forfeiture terminates an existing contract without restitution, while a rescission of a contract generally terminates it with restitution and restores the parties to their original status. [17B CJS, Contracts, § 612, p 48 (emphasis added, footnotes omitted).]

In sum, "rescission" terminates a contract and places the parties in their original position, even if restitution is necessary, and "forfeiture" terminates a contract without restitution. Because plaintiff in this case seeks to enforce the termination clause in the contract, we conclude that the equitable remedy of rescission is not applicable. We further conclude that, by reading the default provision of the Lease to include the term "material breach," the trial court effectively rewrote or reformed the contract. See *Titan Ins Co v Hyten*, 291 Mich App 445, 451-452; 805 NW2d 503 (2011) (noting that reformation allows a court to consider a contract to have different terms than provided in the document when those terms fail to express the intentions of the party), rev'd on other grounds 491 Mich 547 (2012).

Our view is supported by our Supreme Court's consistent pronouncements that an unambiguous contract *must* be enforced as written unless it violates the law, is contrary to public policy, or is unenforceable under traditional contract defenses. *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005); *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52, 62-63; 664 NW2d 776 (2003); See also *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). In *Rory*, the Supreme Court stated:

> This approach, where judges . . . rewrite the contract . . . is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some

> highly unusual circumstance such as a contract in violation of law or public policy. This Court has recently discussed, and reinforced, its fidelity to this understanding of contract law . . . . The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art I, § 10, cl. 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of Yale Law School, who wrote on this topic in his definitive study of contract law, Corbin on Contracts, as follows:
>
> "One does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made." [*Rory*, 473 Mich at 469-470, quoting *Wilkie*, 469 Mich at 51-52, quoting 15 Corbin, Contracts (Interim ed), ch 79, § 1376, p 17 (footnotes omitted).]

Although *Rory* did not expressly decide whether a contract forfeiture clause was enforceable, it made clear that a court has no power to ignore a contract's plain and unambiguous term because the court holds the view that the term ostensibly was "unreasonable." *Rory*, 473 Mich at 468-469. *Rory* is applicable here on this very point; this Court cannot refuse to enforce the plain and unambiguous terms of the lease herein on the basis that the forfeiture clause is "unfair." Hence, we reiterate the Supreme Court's holding that courts are not free to rewrite or ignore the plain and unambiguous language of contracts except in exceptional circumstances. *Id*. at 470.

Defendant has not established that the requisite exceptional circumstances exist in this case sufficient to justify ignoring the plain language of its contract with plaintiff. First, defendant makes no claim that the forfeiture provision violates the law. Likewise, we find that the forfeiture clause is not contrary to public policy.

> [T]he determination of Michigan's public policy "is not merely the equivalent of the personal preferences of a majority of [the Supreme] Court; rather, such a policy must ultimately be clearly rooted in the law." In ascertaining the parameters of our public policy, we must look to "policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." [*Id*. at 470-471, quoting *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002).]

While the Legislature has limited the effectiveness of express forfeiture clauses in land contracts, MCL 600.5726 (requiring the occurrence of a material breach as a precondition of forfeiture of a land contract, regardless of whether the contract has an explicit termination or forfeiture clause), the Legislature notably has not limited the operation of forfeiture clauses in other contexts. Additionally, forfeiture clauses have existed in contracts in this state for more than 100 years. See, e.g., *Hamilton v Wickson*, 131 Mich 7, 73-76; 90 NW 1032 (1902); *Satterlee v Cronkhite*, 114 Mich 634, 635-636; 72 NW 616 (1897). Thus, we cannot conclude that forfeiture clauses in a contract that is *not* a land contract violate public policy.

As the *Rory* Court stated, "[o]nly recognized traditional contract defenses may be used to avoid the enforcement of [legal] contract provision[s]." *Rory*, 473 Mich at 470. Such defenses include duress, waiver, estoppel, fraud, and unconscionability. *Id*. at 470 n 23. The only recognized defense that could possibly be

relied on in this case, based on defendant's pleadings, is the doctrine of unconscionability. However, "[i]n order for a contract or contract provision to be considered unconscionable, *both procedural and substantive unconscionability must be present*." *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 143; 706 NW2d 471 (2005) (emphasis added).

> Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term. If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability. Substantive unconscionability exists where the challenged term is not substantively reasonable. However, a contract or contract provision is not invariably substantively unconscionable simply because it is foolish for one party and very advantageous to the other. Instead, a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience. [*Id*. at 144 (citations omitted).]

Here, there was no evidence that defendant was in a weaker position than plaintiff and was forced to accept the forfeiture term. Thus, defendant cannot establish any procedural unconscionability. We also conclude that the forfeiture clause was not substantively unconscionable. While the term undoubtedly favors plaintiff, the advantage given to plaintiff in the contract does not shock the conscience. In addition, forfeiture did not occur immediately upon defendant's breach; the Lease allowed defendant 30 days to cure any breach before the Lease would be terminated. Under these circumstances, the forfeiture clause was not "substantively unreasonable." Therefore, the forfeiture provision was not avoidable under the unconscionability doctrine.

In sum, "a court may not revise or void the unambiguous language of [an] agreement to achieve a result that it views as fairer or more reasonable." *Rory*, 473

Mich at 489. As a result, the trial court erred when it failed to enforce the forfeiture clause of the Lease based on defendant's breach not being a "material breach." As a matter of law, plaintiff successfully invoked the default provision of the Lease and terminated the Lease on November 24, 2008. Under ¶ 17 of the Lease, the Lease's termination also extinguished defendant's option to purchase. Hence, because the Lease was terminated on that date, defendant's attempt to exercise the Lease's option-to-purchase provision on December 22, 2008, was void.

B. DEFENDANT'S CROSS-APPEAL

Defendant argues that it did not breach the contract when it failed to consent to the easement agreement. Specifically, defendant argues that (1) the easement agreement was to be finalized and executed at the conclusion of the merger negotiations, (2) the parties never reached an agreement with respect to the terms of the easement, and (3) plaintiff's October 7, 2008, letter did not comply with the notice provision of Paragraph 26. We conclude that defendant was not excused from complying with its obligation under the Lease.

In pertinent part, ¶ 22 of the Lease stated:

> Tenant *shall* permit drainage and utility easements and road crossings to be developed by Landlord on the Premises *as required* to permit development to occur on Landlord's Other Real Estate. [Emphasis added.]

Thus, defendant was required to consent to plaintiff's Road Easement. The Lease, however, did provide that the location of any easements must be "in areas mutually agreeable." As such, the only valid reason to withhold consent to the Road Easement would have

been the failure to agree on a location. However, there was no evidence to show that defendant's refusal to consent was based on an objection to the location.[3] We note that during the 30-day window that followed Crouse's October 7, 2008, letter, defendant failed to make *any* objection or provide any rationale for its refusal to consent. Defendant's next communication was issued on November 10, 2008, which was after the 30-day deadline expired. Therefore, defendant's failure to consent to the Road Easement was a breach of the plain and unambiguous terms of the Lease.

Defendant also argues that consent to the Road Easement was not required because it was contingent upon finalization of the merger agreement. While the parties undoubtedly discussed that consent would occur contemporaneous to a merger, there was no evidence that the parties intended to amend, or did amend, the provision of the Lease that defendant give consent "as required."

Defendant further contends that the easement agreement was not ripe for its consent because the agreement failed to capture other conditions, such as (1) noting that all costs were plaintiff's responsibility, (2) ensuring that the integrity of the golf course would not be disturbed, and (3) ensuring that the golf course would be left in an equal or better condition when the work was complete. Nothing in Paragraph 22 makes defendant's requirements to grant an easement contingent on these asserted conditions.[4] Thus, defendant's

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[3] In fact, the document that defendant *provided* to plaintiff in December 2008 used the same location for the easement that plaintiff initially proposed.

[4] We note that if plaintiff were to have undermined the integrity or condition of the golf course through construction or maintenance of easements, defendant would have been entitled to a variety of possible contract remedies.

insistence that the Lease required these provisions in any easement agreement is without merit.

Last, defendant claims that plaintiff's October 7, 2008, letter did not satisfy the notice requirements spelled out in ¶ 31 of the Lease. We disagree. Paragraph 31 provides in pertinent part,

> Whenever it is provided herein that notice, demand, request, or other communication shall or may be given to or served upon either of the parties by the other, and whenever either of the parties shall desire to give or serve upon the other any notice, demand, request, or other communication with respect hereto or with respect to the Premises, each such notice, demand, request, or other communication shall be in writing and, any law or statute to the contrary notwithstanding, shall be effective for any purpose if given or served as follows:
>
> A. If by Landlord, by mailing the same to Tenant by registered mail, postage prepaid, return receipt requested . . . .

Defendant claims that the October 7, 2008, letter was deficient in several ways: (1) it was not sent via registered mail, (2) the letter did not provide any notice, and (3) the letter did not indicate what consequences would happen if the 30-day deadline was not met.

Nothing in the record supports defendant's claim that the letter was not sent via registered mail. Defendant cites to the letter itself and cites to Crouse's affidavit as evidence of the letter not being sent via registered mail. However, the letter does not identify either way how it was mailed. And Crouse states in his affidavit that he mailed the letter "consistent with notice provisions contained in the Lease."

Defendant's remaining claims of deficiencies are also without merit. The Lease does not require the written notice to contain any specific words, such as "notice" or

"default." In this case, the letter referred to defendant's continuing obligation under ¶ 22 of the Lease to provide the consent, explained that defendant has been delinquent for nearly a year, and established a 30-day time period to cure the defect. This 30-day time period matches the 30-day time period of ¶ 26. Therefore, the trial court correctly concluded that the letter satisfied the notice requirements of the Lease.

Defendant's final issue on cross-appeal relates to whether its invoking of the option to purchase was invalid. As already discussed, we conclude that plaintiff properly terminated the Lease prior to defendant invoking the option, thereby making defendant's attempt to purchase void. Although the trial court concluded that defendant could not invoke the option to purchase for different reasons, we will not reverse a trial court's ruling when it reaches the right result for the wrong reason. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007).

C. CONCLUSION

In conclusion, the trial court erred when it did not interpret the Lease according to its plain and unambiguous terms. On remand, the trial court is to enter an order granting summary disposition in favor of plaintiff on counts I, II, and V of its complaint.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, the prevailing party, may tax costs pursuant to MCR 7.219.

TALBOT and SERVITTO, JJ., concurred with WILDER, P.J.

In re APPLICATION OF INDIANA MICHIGAN POWER COMPANY TO INCREASE RATES

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES

Docket Nos. 299590 and 299591. Submitted February 8, 2012, at Lansing. Decided July 10, 2012, at 9:05 a.m. Leave to appeal denied, 493 Mich 946.

Indiana Michigan Power Company and Consumers Energy Company filed separate applications with the Public Service Commission (PSC) seeking the authority to amend their electric rates in order to increase annual revenue. The PSC issued orders holding that the petitioners could self-implement temporary rate increases by increasing rates according to certain percentages with the percentages varied for different classes of ratepayers instead of applying equal-percentage increases to all base rates. The Attorney General appealed by right the PSC's orders with regard to both Indiana Michigan Power (Docket No. 299590) and Consumers Energy (Docket No. 299591), arguing that equal-percentage increases for all base rates were required. The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. A moot issue will be reviewed if it is publically significant, likely to recur, and yet likely to evade judicial review. Although the PSC had set final rates with respect to both utilities, arguably rendering the issue moot, the issue was publically significant, likely to recur, and likely to evade judicial review and, thus, could be reviewed.

2. An electric utility may not increase its rates and charges or alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, without first receiving approval from the PSC. However, under MCL 460.6a(1), a utility is afforded the right to self-implement an interim rate increase through equal-percentage increases or decreases applied to all base rates six months after filing a complete application if the PSC has not issued an order. Rather than requiring PSC approval, the PSC is relegated to issuing a temporary order preventing or delaying the interim increase if there is

good cause. Under MCL 460.11(1), beginning January 1, 2009, the PSC was required to phase in electric rates equal to the cost of providing service to each customer class over a period of five years from the effective date of 2008 PA 286. The PSC determined that if the self-implemented rates were of equal percentages for all base rates, it would frustrate the mandate in § 11(1) to phase in cost-based rates. Pursuant to § 6a(1), if a utility self-implements interim rate increases before the PSC issues a final order, the utility must use an equal-percentage surcharge. But the orders issued by the PSC in these cases were consistent with the PSC's authority to issue cost-based rates and with the legislative mandate to phase in cost-based rates. To fulfill its obligation to phase in cost-based rates, the PSC has the necessary authority to gradually implement the cost-based rates through approval of varying rate adjustments. However, after the five-year phase-in-period, the PSC will be barred from preventing or delaying self-implementation of equal-percentage rate increases except for good cause.

Affirmed.

MURRAY, J., dissenting, disagreed with the majority's decision to affirm, concluding that the statutory language was dispositive. Under MCL 460.6a(1), if the PSC does not issue a final rate order within 180 days of the application being filed, a utility is permitted to implement a temporary rate increase up to the amount of the proposed annual rate request through equal-percentage increases or decreases applied to all base rates. Once this rate change occurs, the PSC is powerless to stop it unless it finds good cause to do so. Because the PSC did not issue a final order within 180 days of either petitioner's application, nor did it find good cause to prevent or delay the temporary rate changes, the PSC's orders were illegal. Enforcement of MCL 460.6a(1) does nothing to interfere with the PSC's cost-based rate phase-in obligation under MCL 460.11(1) because the PSC can ensure that the rates established in final orders meet the cost-based rate requirements of § 11(1). If allowing these temporary rate increases by the utilities does interfere with the PSC's obligation under § 11(1), nothing prohibits the PSC from using that reason for establishing good cause to prohibit the temporary rate increases under MCL 460.6a(1).

PUBLIC UTILITIES — INTERIM RATE INCREASES — PUBLIC SERVICE COMMISSION.

A utility may self-implement an interim rate increase through equal-percentage increases or decreases applied to all base rates six months after filing a complete application for a rate change

with the Public Service Commission (PSC); the PSC is relegated to issuing a temporary order preventing or delaying the interim increase if there is good cause; the PSC is required to phase in electric rates equal to the cost of providing service to each customer class over a period of five years from the effective date of 2008 PA 286; if a utility self-implements interim rate increases before the PSC issues a final order, the utility must use an equal-percentage surcharge; but in order to fulfill its obligation to phase in cost-based rates, the PSC has the necessary authority to gradually implement cost-based rates through approval of interim varying-percentage rate adjustments; after the five-year phase-in-period, the PSC will be barred from preventing or delaying self-implementation of equal-percentage rate increases except for good cause.

Warner Norcross & Judd LLP (by *Richard J. Aaron*) for Indiana Michigan Power Company.

Bill Schuette, Attorney General, and *S. Peter Manning* and *Donald E. Erickson*, Assistant Attorneys General, for the Attorney General in *Indiana Michigan Power*.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Steven D. Hughey* and *Anne M. Uitvlugt*, Assistant Attorneys General, for the Public Service Commission in *Indiana Michigan Power*.

Jon R. Robinson, *H. Richard Chambers*, and *Eric V. Luoma* for Consumers Energy Company.

Bill Schuette, Attorney General, and *S. Peter Manning*, *Michael E. Moody*, and *Donald E. Erickson*, Assistant Attorneys General, for the Attorney General in *Consumers Energy*.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Steven D. Hughey* and *Spencer A. Sattler*, Assistant Attorneys General, for the Public Service Commission in *Consumers Energy*.

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

FITZGERALD, P.J. In Docket No. 299590, the Michigan Public Service Commission ("PSC" or "the Commission") issued an order holding that Indiana Michigan Power Company ("Indiana Michigan") could self-implement a temporary rate increase by applying different percentage increases to different base rates instead of applying equal-percentage increases to all base rates as provided for by MCL 460.6a(1). In Docket No. 299591, the PSC issued an order holding that Consumers Energy Company ("Consumers Energy") could also self-implement a temporary rate increase using varying percentage increases for different base rates. The Attorney General appeals by right in both cases, arguing that equal-percentage increases for all base rates were required. We affirm.

MCL 460.6a(1) provides in relevant part:

> A gas or electric utility shall not increase its rates and charges or alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, without first receiving commission approval as provided in this section. . . . The commission shall notify the utility within 30 days of filing, whether the utility's petition or application is complete. . . . If the application is not complete, the commission shall notify the utility of all information necessary to make that filing complete. If the commission has not notified the utility within 30 days of whether the utility's petition or application is complete, the application is considered complete. *If the commission has not issued an order within 180 days of the filing of a complete application, the utility may implement up to the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates*. For a petition or application pending before the commission prior to the effective date of the amendatory act that added this sentence, the 180-day period

> commences on the effective date of the amendatory act that added this sentence. If the utility uses projected costs and revenues for a future period in developing its requested rates and charges, the utility may not implement the equal percentage increases or decreases prior to the calendar date corresponding to the start of the projected 12-month period. *For good cause, the commission may issue a temporary order preventing or delaying a utility from implementing its proposed rates or charges*. If a utility implements increased rates or charges under this subsection before the commission issues a final order, that utility shall refund to customers, with interest, any portion of the total revenues collected through application of the equal percentage increase that exceed the total that would have been produced by the rates or charges subsequently ordered by the commission in its final order. [Emphasis added.]

This version of § 6a(1) was enacted by 2008 PA 286, which also added § 11(1), MCL 460.11(1). Section 11(1) provides:

> This subsection applies beginning January 1, 2009. Except as otherwise provided in this subsection, the commission shall phase in electric rates equal to the cost of providing service to each customer class over a period of 5 years from the effective date of the amendatory act that added this section. If the commission determines that the rate impact on industrial metal melting customers will exceed the 2.5% limit in subsection (2), the commission may phase in cost-based rates for that class over a longer period. The cost of providing service to each customer class shall be based on the allocation of production-related and transmission costs based on using the 50-25-25 method of cost allocation. The commission may modify this method to better ensure rates are equal to the cost of service if this method does not result in a greater amount of production-related and transmission costs allocated to primary customers.

In these cases, the PSC determined that interim, self-implemented, equal-percentage increases would frus-

trate the phase-in of cost-based rates. Accordingly, it allowed for interim, self-implemented rate increases but required that they be of varying percentages for different base rates.

I. THE FACTS

A. INDIANA MICHIGAN

On January 27, 2010, Indiana Michigan filed an application seeking authority to amend its electric rates to increase annual jurisdictional operating revenues by approximately $62.5 million. Noting that a self-implemented rate increase could be applied as of July 26, 2010, in the absence of an order preventing or delaying self-implementation for good cause, the PSC issued an order on April 13, 2010, in which it determined that it needed information on the new rates before it could make a decision on such an order. It therefore directed Indiana Michigan to file the tariffs it proposed to implement during the interim period. Further, it required that a witness "support the reasonableness of the proposed tariffs and . . . provide evidence regarding the effect of the statutory rate design option [i.e., equal percentage increases or decreases applied to all base rates] and reasonable alternatives thereto." David M. Roush, the Director of Regulated Pricing and Analysis at Indiana Michigan's parent company, subsequently explained that Indiana Michigan was proposing to apply a surcharge rider to existing tariffs and rates that would apply as a percentage of the total monthly charges under the existing rates. With certain exclusions, the applicable percentage was to vary by tariff and would maintain the same relationships as the requested first-year rate increase. While this was inconsistent with § 6a(1), Roush noted that a uniform percentage increase would significantly raise the increases

for some classes; he asserted that the proposed increases would be consistent with § 11(1).

The PSC adopted the alternative proposed by Roush. It noted that in a May 12, 2009 order in an unrelated case, *In re Application of Consumers Energy Co* (PSC Case No. U-15645), it had previously ruled as follows:

> Public Act 286 of 2008 contains two conflicting sections (Section 6a(1) and Section 11(1)) regarding rate design which require reconciliation by the Commission. In the present filing, this conflict would result in a percentage increase for some rate classes that is greater than what Consumers proposes for its final rate structure, including rate classes that have been identified as having rates in excess of the cost of providing service. Although the Act provides for a refund of amounts charged that are greater than what is approved in the final order, the rate refund mechanism may not necessarily result in a refund that equals the amount of any overcharge for these identified rate classes. This result would be in direct conflict with the Commission's statutory mandate under Section 11(1).
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> * * *
>
> Statutes that relate to the same subject are *in pari materia* and are thus read together, even if each provision does not reference the other. *Michigan Electric Cooperative Ass'n v Public Service Comm*, 267 Mich App 608, 616; 705 NW2d 709 (2005). The goal of statutory interpretation remains that of discerning and applying the Legislature's intent as expressed in the words of the statute. *Id*.
>
> In reaching this conclusion, the Commission is mindful of its duty to the public interest. It thus understands Section 6a(1) as addressing situations in which existing rate classes are not subject to structural realignments of the kind explicitly required in Section 11(1). The Commission does not accept the conclusion that the Legislature intended to create a scheme in the statute to produce outcomes that, as ABATE suggests, could verge upon the absurd. This is illustrated by the present case, in which

> Consumers' proposal, as is, would produce volatile rate swings from existing rates to self-implemented rates to the rates implemented by the final order. It would require commercial and industrial customers to absorb millions of dollars in temporary rate hikes, with no apparent cost justification, at a time when Michigan's business climate is a matter of national focus. Such an outcome would be far removed from any reasonable person's conception of the public interest.

In the Indiana Michigan case, the PSC similarly concluded "that a rate change based on an equal percentage increase would lead to a result where [Indiana Michigan's] rates became more, rather than less, skewed."

B. CONSUMERS ENERGY COMPANY

On January 22, 2010, Consumers Energy filed an application seeking authorization to increase its electric rates to produce additional revenues of approximately $178 million annually. The PSC again directed the utility to file the tariffs it proposed to self-implement and to produce a witness "to support the reasonableness of the proposed tariffs and . . . provide evidence regarding the effect of the statutory rate design option and reasonable alternatives thereto." Ronn J. Rasmussen, Vice President of Rates and Regulation at Consumers Energy, testified that the Company was intending to self-implement increases by imposing "interim surcharges that were calculated based upon the equal percentage increase approach specified in MCL 460.6a(1)." Rasmussen considered a self-implemented rate design that would have used varying rates, but testified that the first approach was preferred because it complied with § 6a(1) and using an equal-percentage increase would postpone until the final order Commission decisions regarding the appropriate cost-of-service

allocation and corresponding rate design. The PSC rejected this proposal. For the same reasons set forth in its decision in the Indiana Michigan case, it held that the self-implemented rates should vary from rate class to rate class.

II. MOOTNESS

Indiana Michigan argues that the appeal is moot because, following a settlement agreement, the PSC issued a final order setting Indiana Michigan's final rates on October 14, 2010. Moreover, a final rate was set with respect to Consumers Energy by an order entered on November 4, 2010. However, a moot issue will be reviewed if it is publicly significant, likely to recur, and yet likely to evade judicial review. *Attorney General v Pub Serv Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2006). Because the issue involves rates charged to a multitude of consumers, it is publicly significant. Moreover, because the issue may arise when rate increases are sought through 2013, and such requests are likely, it is likely to recur. Because the PSC must issue final orders on rates within one year, the issue would likely evade review. Final rates would presumably be set in most if not all instances before the issue wends its way through the appellate process. Accordingly, we will address the issue.

III. STANDARD OF REVIEW

This is a rate case, but resolution of the issue on appeal turns on the validity of the PSC's interpretation of §§ 6a(1) and 11(1). In *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App 106, 109-110; 804 NW2d 574 (2010), the Court stated:

> The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares,

charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. See also *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). A reviewing court gives due deference to the PSC's administrative expertise, and should not substitute its judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).

A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Application of Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

The standard of review for an agency's interpretation of a statute was recently set forth in *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), quoting *Boyer-Campbell v Fry*, 271 Mich 282, 296-297; 260 NW 165 (1935):

"[T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws

> and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature."
>
> This standard requires "respectful consideration" and "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue. [Second alteration in original.]

IV. ANALYSIS

The PSC properly construed § 11(1) as giving it authority to issue an order allowing the utilities to self-implement an interim rate on something other than an equal percentage basis as part of the phase-in of cost-based rates.

Before the adoption of 2008 PA 286, § 6a(1) provided that when a utility sought a rate increase, it could move for partial and immediate relief, which the PSC could grant in its discretion after providing notice to interested parties and the opportunity for a full and complete hearing. See MCL 460.6a(1) as amended by 1992 PA 37. The new version of § 6a(1) changes this procedure in part by affording a utility the right to self-implement an interim rate after six months; the PSC is then relegated to issuing a temporary order preventing or delaying the interim increase if there is good cause.

In the present cases, the PSC determined that the right to self-implement interim increases in rates would be triggered because it would not be able to make a determination on a final rate within 180 days. It therefore sought information from which it could make a good-cause determination. However, it did not determine that there was good cause for delaying or preventing self-implementation. Rather, it determined that

self-implementation could go forward, but it precluded the utilities from using equal-percentage increases for all rates.

> The PSC possesses no common-law powers. It is a creature of the Legislature, and all of its authority must be found in statutory enactments. *Union Carbide Corp v Public Service Comm*, 431 Mich 135, 146; 428 NW2d 322 (1988). A statute that grants power to an administrative agency is to be strictly construed. *Miller Bros*[*v Pub Serv Comm*, 180 Mich App 227, 232; 446 NW2d 640 (1989)]. Administrative authority must be plainly granted, for doubtful power in this context does not exist. *Id*. [*Attorney General v Pub Serv Comm*, 231 Mich App 76, 78; 585 NW2d 310 (1998)].

Section 6a(1) did not authorize the PSC to take this action. While it allowed prevention or delay of self-implementation for good cause, it did not authorize self-implementation using varying percentages for different rates. Thus, the PSC must have had some other grant of power that would authorize it to make this ruling. The only authority cited is § 11(1).

The PSC concluded that § 6a(1) conflicted with § 11(1) and that the two statutes had to be read *in pari materia*. In *Robinson v City of Lansing*, 486 Mich 1, 8 n 4; 782 NW2d 171 (2010), quoting *Dearborn Twp Clerk v Jones*, 335 Mich 658, 662; 57 NW2d 40 (1953), the Court stated, " 'It is elementary that statutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and that courts will regard all statutes upon the same general subject matter as part of 1 system.' " Stated differently, " '[s]tatutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole' to fully reveal the Legislature's intent." *Bush v Shabahang*, 484 Mich 156, 191; 772 NW2d 272 (2009) (MARKMAN, J., dissenting), quoting *People v Harper*, 479

Mich 599, 621; 739 NW2d 523 (2007). However, "the interpretive aid of the doctrine of in pari materia can only be utilized in a situation where the section of the statute under examination is itself ambiguous." *Tyler v Livonia Pub Sch*, 459 Mich 382, 392; 590 NW2d 560 (1999), citing *Voorhies v Faust*, 220 Mich 155, 157; 189 NW 1006 (1922). "If two statutes lend themselves to a construction that avoids conflict, that construction should control." *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 148; 762 NW2d 192 (2009). In *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 559-560; 808 NW2d 456 (2010), the Court summarized:

> A statutory provision is ambiguous if it irreconcilably conflicts with another provision or when it is equally susceptible to more than one meaning. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177-178 n 3; 730 NW2d 722 (2007). A statutory provision should be viewed as ambiguous only after all other conventional means of interpretation have been applied and found wanting. *Id*. at 178 n 3. If a statute is ambiguous, judicial construction is appropriate. *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 434; 770 NW2d 105 (2009). "Where the language of a statute is of doubtful meaning, a court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose." *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994). When construing statutes, the terms of statutory provisions with a common purpose should be read *in pari materia*. *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999). The objective of this rule is to give effect to the legislative purpose as found in statutes addressing a particular subject. *Id*. "Conflicting provisions of a statute must be read together to produce an harmonious whole and to reconcile any inconsistencies wherever possible." *Id*.

> When construing a statute, "a court should not abandon the canons of common sense." *Marquis*, 444 Mich at 644. "We may not read into the law a requirement that the lawmaking body has seen fit to omit." *In re Hurd-Marvin Drain*, 331 Mich 504, 509; 50 NW2d 143 (1951). When the Legislature fails to address a concern in the statute with a specific provision, the courts "cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose." *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 142; 662 NW2d 758 (2003). Therefore, when necessary to interpret an ambiguous statute, the appellate courts must determine the reasonable construction that best effects the Legislature's intent. *Id*.

The PSC concluded that if the self-implemented rates were of equal percentages for all base rates, it would frustrate the mandate in § 11(1) to phase in cost-based rates. Concluding that the Legislature would not have intended absurd results, the PSC determined that § 6a(1) addressed "situations in which existing rate classes are not subject to structural realignments of the kind explicitly required in Section 11(1)." The PSC appears to mean that the requirement in § 6a(1) for equal-percentage rate increases was intended to come into play once the phase-in-period was complete and cost-based rates were being charged; after that point, application of an equal-percentage rate increase would not lead to more skewing.

There is a potential conflict between the authority granted to the PSC in § 6a(1) and the authority granted to it in § 11(1). Section 6a(1) expressly allows the PSC to prevent or delay self-implementation of equal-percentage rate increases for good cause, whereas § 11(1) gives it a general grant of authority to phase in cost-based rates over five years. To the extent § 11(1) is exercised in a way that is inconsistent with § 6a(1) such that it authorizes the PSC to allow self-implementation

of something other than an equal-percentage rate increase, a conflict regarding the grant of authority to the PSC arises. Given that both statutes were enacted by 2008 PA 286 and address ratemaking, the provisions must be read *in pari materia* to discern the intent of the Legislature.

Section 6a(1) provides that *the utility* "*may* implement up to the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates" *if* the Commission "has not issued an order within 180 days of the filing of a complete application . . . ." [Emphasis added.] Nothing in this section *requires* the utility to self-implement equal-percentage rate increases or decreases, and nothing in this section requires *the Commission*, acting pursuant to § 11(1), to order an equal-percentage surcharge. Rather, § 6a(1) merely provides that, if the utility self-implements interim rate increases before the Commission issues a final order, under those circumstances, *the utility* must use an equal-percentage surcharge.

In these cases, the Commission did not stop self-implementation by Indiana Michigan and Consumers Energy, but instead directed that, if the utilities decided to self-implement rate increases (in other words, to implement rate increases before a final order), they had to do so using cost-based rates. These orders were consistent both with the authority to issue cost-based rates granted to the Commission under § 11(1) and also with the legislative mandate that "the commission *shall* phase in electric rates equal to the cost of providing service to each customer class over a period of 5 years . . . ." MCL 460.11(1) (emphasis added). Moreover, nothing in the plain language of § 11(1) limits the

Commission's obligation to impose cost-based rates to rates established in final orders.

We find no cogent reason for concluding that the PSC erred by interpreting the statute to mean that § 11(1) granted it overriding authority for the five-year phase-in period. Section 6a(1) is a statute that will presumably be in effect long after the authority in § 11(1) is exhausted. When § 6a(1) stands alone, the PSC will be barred from preventing or delaying self-implementation of equal-percentage rate increases except for good cause. However, during the phase-in-period the PSC has authority to gradually bring about cost-based rates; use of the phrase "phase in" suggests that a gradual approach was desired. Roush indicated that if Indiana Michigan applied equal-percentage rate increases for the interim period it would "slightly reduce the increases for classes that require above average increases to move toward cost of service [and] raise[] significantly the increases for other classes." Rasmussen advocated an equal-percentage approach, believing the phase-in issue could be addressed in the final rate order, but his testimony suggests similar fluctuations would occur. Thus, all during the course of a single year, the existing rate would be in place, six months later an interim rate would be applied that would be further at odds with cost-based rates, and then ultimately rates closer to cost-based rates would be imposed, albeit with a refund of revenues collected through application of the equal-percentage rate increase. Then the same scenario would occur in the subsequent year if another rate increase were sought. While these spikes and valleys in rates could be addressed with refunds at the end of the rate year, they would not be consistent with a gradual implementation of cost-based rates. Section 11(1) was enacted with the intent of bringing about a specified change within five

years. The PSC's determination that varying percentage rate increases during that five years will allow it to better meet its mission of phasing in the change is consistent with the grant of authority in § 11(1). While this is greater than the authority conferred on the PSC by § 6a(1), the provisions, when read together, suggest that such flexibility was intended for the phase-in-period. Thus, we conclude that the grant of authority in § 11(1) to "phase in" cost-based rates over a five-year period gave the PSC broad authority to accomplish the phase-in in a fluid manner. Thus, the PSC could manipulate the interim, self-implemented rate for the five-year phase-in-period to the extent such manipulation would be consistent with the gradual implementation of cost-based rates.

Affirmed.

WILDER, J., concurred with FITZGERALD, P.J.

MURRAY, J. (*dissenting*). The single issue presented to this Court for resolution is whether the Michigan Public Service Commission properly exercised its authority under MCL 460.6a(1) and MCL 460.11(1). Resolution of that issue depends on what authority was given to the commission under those statutes. As discussed below, because it is undisputed that the commission did not make a finding of good cause under MCL 460.6a(1), it was without authority to issue the interim orders, and so I dissent from the majority's decision to affirm.

The statutory language contained within these two sections is dispositive of this issue. First is MCL 460.6a(1), which in part addresses a utility's ability to implement temporary rate increases if the commission fails to issue a final order within 180 days of the filing

of a complete application with the commission. MCL 460.6a(1) provides, in pertinent part:

> A gas or electric utility shall not increase its rates and charges or alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, without first receiving commission approval as provided in this section. The utility shall place in evidence facts relied upon to support the utility's petition or application to increase its rates and charges, or to alter, change, or amend any rate or rate schedules. The commission shall require notice to be given to all interested parties within the service area to be affected, and all interested parties shall have a reasonable opportunity for a full and complete hearing. A utility may use projected costs and revenues for a future consecutive 12-month period in developing its requested rates and charges. The commission shall notify the utility within 30 days of filing, whether the utility's petition or application is complete. A petition or application is considered complete if it complies with the rate application filing forms and instructions adopted under subsection (6). A petition or application pending before the commission prior to the adoption of filing forms and instructions pursuant to subsection (6) shall be evaluated based upon the filing requirements in effect at the time the petition or application was filed. If the application is not complete, the commission shall notify the utility of all information necessary to make that filing complete. If the commission has not notified the utility within 30 days of whether the utility's petition or application is complete, the application is considered complete. *If the commission has not issued an order within 180 days of the filing of a complete application, the utility may implement up to the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates.* For a petition or application pending before the commission prior to the effective date of the amendatory act that added this sentence, the 180-day period commences on the effective date of the amendatory act that added this sentence. If the utility uses projected costs and revenues for a future period in developing its requested rates and charges,

> the utility may not implement the equal percentage increases or decreases prior to the calendar date corresponding to the start of the projected 12-month period. *For good cause, the commission may issue a temporary order preventing or delaying a utility from implementing its proposed rates or charges. If a utility implements increased rates or charges under this subsection before the commission issues a final order, that utility shall refund to customers, with interest, any portion of the total revenues collected through application of the equal percentage increase that exceed the total that would have been produced by the rates or charges subsequently ordered by the commission in its final order.* The commission shall allocate any refund required by this section among primary customers based upon their pro rata share of the total revenue collected through the applicable increase, and among secondary and residential customers in a manner to be determined by the commission. The rate of interest for refunds shall equal 5% plus the London interbank offered rate (LIBOR) for the appropriate time period. For any portion of the refund which, exclusive of interest, exceeds 25% of the annual revenue increase awarded by the commission in its final order, the rate of interest shall be the authorized rate of return on the common stock of the utility during the appropriate period. Any refund or interest awarded under this subsection shall not be included, in whole or in part, in any application for a rate increase by a utility. Nothing in this section impairs the commission's ability to issue a show cause order as part of its rate-making authority. [Emphasis added.]

The other subsection at issue, MCL 460.11(1), requires that the commission phase-in, over a five-year period, electric rates based on the cost of providing service to each customer class:

> This subsection applies beginning January 1, 2009. *Except as otherwise provided in this subsection, the commission shall phase in electric rates equal to the cost of providing service to each customer class over a period of 5 years from the effective date of the amendatory act that added this section.* If the commission determines that the

> rate impact on industrial metal melting customers will exceed the 2.5% limit in subsection (2), the commission may phase in cost-based rates for that class over a longer period. The cost of providing service to each customer class shall be based on the allocation of production-related and transmission costs based on using the 50-25-25 method of cost allocation. The commission may modify this method to better ensure rates are equal to the cost of service if this method does not result in a greater amount of production-related and transmission costs allocated to primary customers. [Emphasis added.]

In determining the meaning of this statutory language, we are guided by our recent explication of statutory construction principles in the context of an administrative appeal set forth in *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 129-130; 807 NW2d 866 (2011):

> The construction of a statute by a state administrative agency charged with administering it " 'is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.' " *In re Complaint of Rovas*, 482 Mich [90,] 103 [754 NW2d 259 (2008)], quoting *Boyer-Campbell Co v Fry*, 271 Mich 282, 296; 260 NW 165 (1935). Even so, " '[r]espectful consideration' is not equivalent to any normative understanding of 'deference' as the latter term is commonly used . . . ." *In re Complaint of Rovas*, 482 Mich at 108. Indeed, an administrative agency's interpretation "is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Id*. at 103; see also *Ins Institute of Mich* [*v Comm'r of the Office of Fin & Ins Servs*], 486 Mich [370,] 385 [785 NW2d 67 (2010)]. Thus, even a longstanding administrative interpretation cannot overcome the plain language of a statute. *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, 173; 744 NW2d 184 (2007).

Thus, if the statutes contain plain and unambiguous language, we cannot give even "respectful consider-

ation" to the commission's view on what the statutes require, for it is the judicial branch's role to enforce the clear and unambiguous statutory language.

The answer to the question is clear when enforcing the plain and unambiguous language of these statutes. Under MCL 460.6a(1), if the commission does not issue a final rate order within 180 days of the application being filed, a utility is permitted to implement a temporary rate increase up to "the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates." Once this rate change occurs, the commission is powerless to stop it unless the commission finds good cause to do so, which did not occur in either case. Additionally, the statute clearly specifies what type of rate can be implemented, i.e., only those through "equal percentage" increases and decreases. Hence, the Legislature was not concerned with cost-based rates in the *initial* implementation of a temporary rate change. Instead, it appears that the policy of cost-based rates is effectuated at the conclusion of the temporary rate, as the statute provides a self-implementing remedy of returning the excess collected from customers if the ultimate rate approved is lower than that provided for in the temporary, equal-percentage rate change. Thus, because the commission did not issue a final order within 180 days of either application, nor did it find good cause to prevent or delay the temporary rate changes, the orders were illegal and must be vacated.

This conclusion is consistent with MCL 460.11(1). That statute requires the commission to implement over a five-year period "electric rates equal to the cost of providing service to each customer class . . . ." Enforcement of MCL 460.6a(1) does nothing to interfere with this phase-in obligation, as the commission can, in these

cases and all other cases, ensure that the rates established in final orders meet the cost-based rate requirements of MCL 460.11(1). Just as importantly, if allowing these temporary rate increases by the utilities does interfere with the commission's obligation under MCL 460.11(1), nothing prohibits the commission from using that reason for establishing good cause to prohibit the temporary rate increases under MCL 460.6a(1). But where, as in these cases, the commission fails to both timely issue a final order and issue any order finding good cause to stop the temporary order, the utility is free to implement the temporary rate increases consistent with MCL 460.6a(1).

Finally, whether the temporary rate orders permitted under MCL 460.6a(1) actually interfere with the commission's obligation to phase-in cost-based rates is of no moment to our duty to enforce the plain statutory language contained in the statute. Given the specific time tables and remedies contained in these statutes, there can be little doubt that the Legislature has carefully crafted the obligations of both the commission and utilities. If enforcing these clear statutes does in fact substantially interfere with the commission's obligation for the five-year phase-in of cost-based rates, the Legislature can amend the provisions of MCL 460.6a(1). We cannot do so by judicial fiat. *Moran v People*, 25 Mich 356, 364-365 (1872) (a court may not strain a statute by construction because this would be legislating by the judiciary).[1]

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[1] Additionally, the commission cannot invoke as a canon of statutory construction what it perceives to be in the "public interest," i.e., Michigan's current economic climate. Instead, the "public interest" is set by the Legislature, and two clear statutes cannot be read to mean something they do not because of its perceived affect on the current economic climate.

GENTRIS v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 300288. Submitted May 1, 2012, at Detroit. Decided May 17, 2012. Approved for publication July 17, 2012, at 9:00 a.m.

John Raymond Gentris, by his next friend and mother, Ramona Thomas, filed an action in the Wayne Circuit Court against State Farm Mutual Automobile Insurance Company, seeking payment for no-fault attendant-care services under MCL 500.3107(1)(a). Plaintiff had been struck by a vehicle in 1997, resulting in severe injuries. State Farm paid plaintiff attendant-care benefits for daily, around-the-clock care from April 2004 to July 22, 2008, and then resumed payments again on December 1, 2008, as directed by court order, until July 31, 2009. State Farm accused Ramona Thomas and her husband of misrepresentation in paperwork submitted to State Farm. Following trial, the jury determined that plaintiff did not incur allowable expenses by or on his behalf arising out of the accidental bodily injury and returned a verdict of no cause of action. State Farm moved for attorney fees, which the court, Kathleen I. Macdonald, J., denied, concluding that it was undisputed that plaintiff was injured and in need of attendant-care services and that the only trial issues concerned whether the caregivers actually performed the services and what hourly rate should have been paid. State Farm also moved to tax costs, which the court denied, stating that State Farm's bill of costs and supporting affidavit did not technically comply with the requirements of MCR 2.625(G). State Farm appealed.

The Court of Appeals *held*:

1. Under MCL 500.3148(2), a court may exercise its discretion and award an insurer reasonable attorney fees for its defense against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation. The trial court abused its discretion by erroneously determining that there could be no finding that plaintiff's claim for benefits was in some respect fraudulent or so excessive as to have no reasonable foundation simply because plaintiff had indisputable injuries and was in need of attendant-care services. The correct issue to be decided on remand was whether Ramona Thomas and her husband had

actually performed the services for which they sought payment and whether the claim was fraudulent in some respect or so excessive as to have no reasonable foundation in the proper context of those findings.

2. Under MCR 2.625(A)(1), a prevailing party in an action is allowed costs unless prohibited by statute or court rules or unless the court directs otherwise for reasons stated in writing and filed in the action. The trial court must justify its decision to decline to award taxable costs to the prevailing party, and its decision should not be reversed on appeal unless its written reasons are totally unsupported by the facts involved in the case. MCR 2.625(G) provides (1) that each item claimed in the bill of costs must be specified particularly, (2) that the bill of costs must be verified and contain a statement that each item or cost or disbursement claimed is correct and has been necessarily incurred in the action and that the services were actually performed, and (3) that if witness fees are claimed, the affidavit in support of the bill of costs must include the distance traveled and the days attended and state that the testimony was actually provided by any witness for whom fees are sought. The trial court erred by concluding that State Farm had failed to comply with MCR 2.625(G)(1) and (2). State Farm's bill of costs properly listed each claimed item with particularity and contained the appropriate statement that each claimed item or cost was correct and had been necessarily incurred in the action. However, because State Farm had failed to file an affidavit regarding witness fees, as required by MCR 2.625(G)(3), the court properly denied its motion for witness fee costs.

3. The trial court did not address plaintiff's argument that regardless of State Farm's compliance with MCR 2.625(G)(1) and (2), certain requested costs that plaintiff had lined out in a copy of the bill of costs were not recoverable under various statutory provisions. Because State Farm did not address plaintiff's argument below or on appeal, those items were not recoverable as taxable costs. Remand was necessary for the trial court to determine whether to award State Farm the remaining costs or decline to award any costs

Order affirmed in part and vacated in part; case remanded.

John C. Auld, P.C. (by *John C. Auld*), for John R. Gentris.

Hewson & Van Hellemont, P.C. (by *Stacey L. Heinonen* and *James F. Hewson*), for State Farm Mutual Automobile Insurance Company.

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM. Defendant, State Farm Mutual Automobile Insurance Company, appeals as of right the trial court's order denying its postjudgment motion for attorney fees and taxable costs. This case involved a five-day jury trial in which the jury found no cause of action with respect to plaintiff's lawsuit that sought payment for no-fault attendant-care services under MCL 500.3107(1)(a). We affirm in part and vacate in part the trial court's order and remand for further proceedings consistent with this opinion.

The attendant-care services were allegedly provided to plaintiff, John Raymond Gentris (hereafter referred to as "plaintiff" or "John"), by his mother, Ramona Thomas, his stepfather, Kelvin Thomas, and other family members, most notably Gourmia Gentris. In 1997, at the age of 16, John was struck by a motor vehicle and severely injured. Ramona Thomas pursued the instant litigation as next friend on John's behalf. The lawsuit, which was commenced in April 2004, concerned the alleged underpayment, and at times nonpayment, of attendant-care benefits from April 2004 until trial in 2010. There is no dispute that State Farm paid attendant-care benefits from April 2004 to July 22, 2008, at a rate of approximately $9 an hour for 24 hours a day, 7 days a week. No attendant-care benefits were paid from July 23, 2008, to November 30, 2008, as State Farm accused the Thomases of misrepresentations in paperwork submitted to State Farm in regard to services supposedly provided. Benefits were resumed per court order on December 1, 2008, and paid through July 31, 2009, at the same hourly rate of about $9, but for 16 and not 24 hours a day, 7 days a week. Thereafter, no attendant-care benefits were paid by State Farm. At trial, plaintiff sought an award of nearly

$800,000, which included a calculation for interest, pursuant to MCL 500.3107.[1] The amount of attendant-care benefits requested by plaintiff was predicated on reviews and surveys showing the average local rates for home healthcare services, which substantially surpassed the hourly rate paid by State Farm. The jury answered the following verdict-form question in the negative: "Were allowable expenses incurred by or on behalf of the Plaintiff arising out of the accidental bodily injury?" Having answered no to this first question on the verdict form, the jury's deliberations were complete.

Following trial, State Farm sought $101,415 in attorney fees pursuant to MCL 500.3148(2), which is part of the no-fault act and provides that "[a]n insurer may be allowed by a court an award of a reasonable sum against a claimant as an attorney's fee for the insurer's attorney in defense against a claim that was in some respect fraudulent or so excessive as to have no reasonable

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[1] MCL 500.3107(1) provides in relevant part:

> Except as provided in subsection (2) [which is inapplicable here], personal protection insurance [PIP] benefits are payable for the following:
>
> (a) Allowable expenses consisting of all *reasonable charges* incurred for *reasonably necessary* products, *services* and accommodations for an injured person's care, recovery, or rehabilitation. [Emphasis added.]

"Under MCL 500.3107, family members are entitled to reasonable compensation for the services they provide at home to an injured person in need of care." *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 164; 761 NW2d 784 (2008). There is no requirement that attendant-care services be supplied by trained medical personnel. *Id*. at 167. The *Bonkowski* panel noted that there was no dispute that 24-hour attendant care was necessary for the plaintiff. *Id*. at 167-168. "In determining reasonable compensation for an unlicensed person who provides health care services, a fact-finder may consider the compensation paid to licensed health care professionals who provide similar services." *Id*. at 164.

foundation." The trial court denied the request for attorney fees on the basis that there was no dispute that John was injured and in need of attendant-care services and that the only trial issues concerned whether the caregivers actually performed the services and what hourly rate should have been paid. Additionally, State Farm sought $50,143 in taxable costs pursuant to MCR 2.625(A), which provides that "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." The trial court denied the request for taxable costs on the basis that State Farm did not comply with the technical requirements of MCR 2.625(G) with respect to the submitted bill of costs and supporting affidavit.

State Farm indicates in its appellate brief that it "never disputed that Mr. Gentris sustained a traumatic brain injury and [has] physical limitations as a result of the subject accident," and State Farm notes that it agreed that John "needed external structure and supervision with activities as the result of his injuries." There is no dispute regarding the accuracy of the diagnosis of traumatic brain injury with cognitive disorder, seizure disorder, left-sided hemiparesis with contracture of the left upper extremity, left foot drop, antalgic gait, and associated depression. There is also no dispute regarding the nature of John's physical problems and limitations with respect to the left side of his body, especially his left hand and arm, which, for all practical purposes, have been rendered nonfunctional, leaving him to tackle tasks using only his right hand and arm. John has various orthotic devices. He has a splint for his left wrist in order to prevent his hand from curling up, a splint for his left elbow, a brace for his left leg, and an ankle-foot orthotic (AFO) for his left ankle and foot,

occasionally referred to as his "boot." On occasion, John also uses a cane for walking. Additionally, there is no dispute that John's primary doctor prescribed attendant-care services for him covering 24 hours a day, 7 days a week. The focus of the litigation was not on whether John had serious injuries necessitating attendant-care services, but on whether Mr. and Mrs. Thomas were actually providing services as claimed, whether the care and services that were provided were adequate, and whether the rate of pay for services was appropriate.

On appeal, State Farm first argues that the trial court erred when it failed to award State Farm attorney fees under MCL 500.3148(2). State Farm contends that the claim for attendant-care benefits was fraudulent and baseless, consisting of blatant misrepresentations and untruths concerning the care allegedly provided to John. According to State Farm, the jury's verdict of no cause of action clearly supports State Farm's description of plaintiff's case as fraudulent and having no reasonable foundation. State Farm notes the claims for benefits relative to February 21, 2009, on which date the Thomases were incarcerated and not watching John; August 13, 2009, on which date the Thomases attended a funeral without John; and August 11, 2009, on which date John was not at home part of the day, yet the Thomases sought benefits for that period and reported that he was at home.[2] With respect to plain-

[2] At trial, it was established by way of testimony, cross-references to daily attendant-care records submitted monthly to State Farm by the Thomases, and surveillance performed by Sherlock Investigations, Inc., that during some of the time frames for which the Thomases sought full attendant-care benefits as documented by the couple, neither of them was actually with John. The Thomases asserted that there were no claims of misrepresentations with respect to the vast and overwhelming majority of days for which benefits were sought. Further, the Thomases

tiff's argument that Gourmia Gentris provided substitute care, State Farms maintains that even Gourmia testified that she allowed John to leave the house unaccompanied at times. Aside from State Farm's claims of fraud, it also posits that plaintiff's request for hundreds of thousands of dollars in benefits constituted a claim that was so excessive as to have no reasonable foundation. Citing unpublished opinions issued by this Court, State Farm argues that the excessiveness of plaintiff's claim was established and demonstrated by the fact that the jury awarded plaintiff nothing in the face of a request amounting to nearly $800,000. In further support of the argument on excessiveness and the absence of a reasonable foundation, State Farm notes that the Thomases sought benefits for times when John was not actually with them or relatives despite indicating otherwise in the daily reports, that the Thomases failed to adequately supervise John, resulting in John leaving the house by himself and smoking marijuana, and that the Thomases failed to ensure that substitute care providers supplied the necessary supervision.[3]

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maintained that if they were not with John at any given time, some other family member was watching or supervising him, which State Farm was aware of since 2004 without complaint. According to the Thomases, with respect to the three dates focused on by State Farm, Gourmia Gentris was caring for John in the absence of the Thomases. Ramona Thomas readily acknowledged that the daily reports listing hourly activities, which she prepared, were not accurate because she would generally fill them out at the end of the month, entering daily and hourly information consistent with typical everyday routines while recalling as best she could any deviations.

[3] A major focus of the trial concerned times when John would walk to a local store by himself, crossing a busy five-lane road in the process, and times when John would walk by himself to visit friends in the neighborhood. The Thomases' position was that it was important to occasionally give John some time on his own or a little independence, which John's primary doctor also believed was beneficial. The Thomases also con-

As already indicated, MCL 500.3148(2) provides that "[a]n insurer *may be allowed* by a court an award of a reasonable sum against a claimant as an attorney's fee for the insurer's attorney in defense against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation." (Emphasis added.) The decision to award or deny attorney fees under MCL 500.3148(2) is reviewed for an abuse of discretion. *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 627; 550 NW2d 580 (1996). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). However, for purposes of MCL 500.3148(2), a "trial court's findings regarding the fraudulent, excessive, or unreasonable nature of a claim should not be reversed on appeal unless they are clearly erroneous." *Beach*, 216 Mich App at 627. A decision is clearly erroneous when a reviewing court is left with a firm and definite conviction that a mistake was made by the lower court. *Moore*, 482 Mich at 516. Any issues regarding what legally constitutes fraud "in some respect," excessiveness, and an unreasonable foundation are questions of law subject to de novo review. See *id*. (noting that issues of statutory interpretation are reviewed de novo).

The language of MCL 500.3148(2) indicates that a court may exercise its discretion by awarding attorney fees to an insurer, but only if a claim was in some respect fraudulent or so excessive as to have no reasonable foundation. The statute does not mandate that the court award attorney fees on a finding of fraud or

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tended that they still monitored John's general whereabouts even when no one personally accompanied John, making sure that he was home on time. The Thomases testified that they had no idea that benefits might not be payable for times when John made his occasional short excursions.

excessiveness,[4] nor does the statute require the court's findings to be based on the jury's verdict. However, the findings must be able to survive review under the clearly-erroneous standard. Further, an award of attorney fees under the statute can be entered by a court on the basis of either fraud standing alone or excessiveness with no reasonable foundation or, of course, on the basis of both factors.

In this case, we need to first ascertain or decipher the reasoning given by the trial court when it denied State Farm's motion for attorney fees. The trial court denied the motion upon concluding that there was no dispute and that the evidence clearly established that John was in need of attendant-care services; therefore, State Farm had failed to demonstrate unreasonableness or to show that plaintiff's claim was so excessive that it had no reasonable foundation. The court indicated that the dispute concerned whether the Thomases actually performed the services and whether the rate of pay was appropriate. We initially note that this is not a case in which the trial court ruled that it was declining to award attorney fees on the basis of its discretion regardless of whether plaintiff's claim was somewhat fraudulent or so excessive as to have no reasonable foundation, which would be a permissible course of action under MCL 500.3148(2), assuming no abuse of discretion. Rather, the trial court denied State Farm's request on

[4] Compare the language of the statute with the mandatory language in MCL 500.3148(1), which provides:

> An attorney *is entitled* to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee *shall be* a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. [Emphasis added.]

the basis of its conclusion that plaintiff's claim was not so excessive that it had no reasonable foundation. The court did not explicitly rule on the issue of fraud, but given its finding that plaintiff's claim for benefits was not unreasonable and considering the denial of attorney fees, it can be implied that the court found that no fraud occurred. Again, the premise of the court's findings was that there was no dispute and that the evidence established that John needed attendant-care services given his injuries.

We vacate the denial of State Farm's request for attorney fees and remand for further proceedings. The trial court's ruling was based on a problematic and faulty legal premise. The court was of the opinion that simply because there was no dispute that John had injuries and was in need of attendant-care services, there could be no finding that plaintiff's claim for benefits was in some respect fraudulent or so excessive as to have no reasonable foundation. The trial court correctly recognized that the primary dispute concerned whether the Thomases actually performed the services for which benefits were sought. Certainly, issues of fraud, excessiveness, and unreasonableness can conceptually permeate the issue regarding whether services were performed.[5] Plaintiff's claim for benefits could still be deemed somewhat fraudulent or so exces-

[5] If a court faced a hypothetical situation in which attendant-care benefits were being sought by a plaintiff who, as established by the evidence, never met, supervised, or cared for an individual unquestionably injured in a car accident and in need of services, it would be nonsensical for the court to deny the insurer's request for attorney fees under MCL 500.3148(2) on the basis that there was no dispute that the injured person needed attendant-care services. We are not saying that the lack of a dispute regarding, or the existence of overwhelming evidence of, the serious nature of a person's injuries and the need for attendant-care services is irrelevant in determining whether to award attorney fees under MCL 500.3148(2). It is pertinent to analyzing a request for

sive as to have no reasonable foundation regardless of the fact that there was no dispute that John sustained serious injuries necessitating attendant-care services. There was no clear error with regard to the trial court's finding that John was in need of attendant-care services, but there was a legal error in the analytical conclusion that the establishment of need precluded the existence of fraud or a finding of excessiveness with no reasonable foundation. A court abuses its discretion when it makes an error of law. *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009). Accordingly, we remand the case to the trial court so that the court, absent the faulty legal premise, can make factual findings regarding fraud, excessiveness, and unreasonableness in the proper context of whether the Thomases actually provided the attendant-care services and whether the rate of pay was appropriate. See *People v Sanders*, 491 Mich 889 (2012) (noting that it is not proper for this Court to make factual findings after rejection of the trial court's incorrect legal premise when the lower court did not have an opportunity to make its own findings absent the legal error). Consistently with the Supreme Court's order in *Sanders* and the well-accepted notion that trial courts (or juries) and not panels of this Court are generally the appropriate fact-finders, we remand for further proceedings.[6]

State Farm also argues that the trial court erred when it refused to award State Farm various taxable costs that were incurred in connection with defending against plaintiff's action. State Farm contends that, contrary to the trial court's ruling, it complied with the

attorney fees under the statute, but it is not the sole factor to consider if established, just part of a larger puzzle.

[6] Nothing in this opinion should be taken as precluding the trial court from exercising its full discretion under the statute as construed by us in this opinion.

technical requirements set forth in MCR 2.625(G) by submitting a proper bill of costs along with a supporting affidavit. According to State Farm, it was entitled to an award of taxable costs as the prevailing party.

MCR 2.625(A)(1) provides that "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." "We review a trial court's ruling on a motion for costs under MCR 2.625 for an abuse of discretion." *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 367; 737 NW2d 807 (2007). However, issues concerning the interpretation and application of MCR 2.625 are reviewed de novo. *Id*. If a trial court declines to award taxable costs to a prevailing party, it "must justify the failure to award costs." *Blue Cross & Blue Shield of Mich v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997). When costs are denied to the prevailing party for reasons written and filed by the court, the court's "determination should not be reversed on appeal unless [its] written reasons are totally unsupported by the facts involved in the case." *American Aggregates Corp v Highland Twp*, 151 Mich App 37, 53; 390 NW2d 192 (1986).

The trial court found that State Farm had failed to comply with MCR 2.625(G), which provides:

> (1) Each item claimed in the bill of costs, except fees of officers for services rendered, must be specified particularly.
>
> (2) The bill of costs must be verified and must contain a statement that
>
> (a) each item of cost or disbursement claimed is correct and has been necessarily incurred in the action, and
>
> (b) the services for which fees have been charged were actually performed.

> (3) If witness fees are claimed, an affidavit in support of the bill of costs must state the distance traveled and the days actually attended. If fees are claimed for a party as a witness, the affidavit must state that the party actually testified as a witness on the days listed.

The trial court expressly mentioned subrules (1) through (3) of MCR 2.625(G), finding no compliance at all. We note that plaintiff never argued a failure to comply with MCR 2.625(G); the trial court raised the matter sua sponte. The trial court erred in its ruling, with respect to MCR 2.625(G)(1) and (2). The bill of costs submitted by State Farm lists each claimed item with particularity and contains the following statement:

> NOW COMES Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, by and through its attorneys, . . . and submits the following Taxable Bill of Costs pursuant to MCR 2.625, and states that each of the following costs have been verified, and each cost or disbursement itemized below is correct, was necessarily incurred, and services for which fees have been charged were actually performed.

Accompanying the bill of costs was an affidavit by State Farm's lead attorney in the case, wherein he averred:

> The costs referenced in the invoice . . . were actually incurred at my direction and the direction of State Farm and were reasonably necessary for the litigation of the case. I have reviewed the charges in the invoice and believe that the amount charged for each service is reasonable in light of the service expended.

These documents reflect compliance with MCR 2.625(G)(1) and (2). With respect to MCR 2.625(G)(3) and witness fees, which requires an affidavit stating distances traveled and days actually attended, State

Farm fails to specifically address the issue in its brief, effectively abandoning any challenge, and no such affidavit is contained in the lower court record. Accordingly, we let stand the trial court's ruling under MCR 2.625(G)(3) that excluded costs associated with witness fees.

With respect to the remainder of the costs, despite State Farm's compliance with MCR 2.625(G)(1) and (2), plaintiff argues that many of the requested costs are not recoverable under a variety of statutory provisions, e.g., MCL 600.2405 (costs and items taxable), MCL 600.2549 (depositions, certified copies, and fees taxable as costs), MCL 600.2441 (sundry costs in civil case), and MCL 600.2529 (circuit court fees). MCR 2.625(A)(1) provides that costs "prohibited by statute" are not recoverable by the prevailing party. As used in MCR 2.625, the term "costs" takes its content from the various statutory provisions that define what items are taxable as costs. *Beach*, 216 Mich App at 622, quoting 3 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), pp 720-721. "The power to tax costs is not unlimited; rather, it is wholly statutory." *Beach*, 216 Mich App at 621. "Indeed, the prevailing party cannot recover costs where there exists no statutory authority for awarding them." *Id*., citing *Herrera v Levine*, 176 Mich App 350, 357; 439 NW2d 378 (1989).

Plaintiff presented the statutory arguments below; however, the trial court entirely failed to address them, relying instead on MCR 2.625(G). In plaintiff's response and brief in opposition to State Farm's motion for taxable costs in the lower court, plaintiff indicated that the taxable costs sought by State Farm that were not authorized by statute included all those "lined out" in an attached copy of the bill of costs. Not every cost was lined out. On appeal, State Farm fails to make any

attempt whatsoever to address or challenge the statutory provisions argued by plaintiff. Rather, State Farm simply indicates that plaintiff did not line out some taxable costs below and, therefore, that by plaintiff's own calculations, an award of $17,924 in taxable costs should be entered. Because of State Farm's failure to even disagree with plaintiff's statutory arguments in its appellate reply brief, and not on the basis of our own substantive analysis of the costs and statutes, we hold that those items previously lined out by plaintiff shall not be recoverable as taxable costs. With respect to any remaining costs being sought by State Farm, after exclusion of the lined-out costs and those costs falling under the witness-fee provision in MCR 2.625(G)(3), the trial court may enter an award in favor of State Farm on those remaining costs or decline to award any costs, as long as the court provides an adequate reason in writing under MCR 2.625(A)(1).

We affirm in part and vacate in part the trial court's order regarding attorney fees and taxable costs and remand for proceedings consistent with this opinion. We do not retain jurisdiction. We decline to award taxable costs under MCR 7.219.

MURPHY, C.J., and STEPHENS and RIORDAN, JJ., concurred.

RADINA v WIELAND SALES, INC

Docket No. 301090. Submitted December 7, 2011, at Lansing. Decided July 17, 2012, at 9:05 a.m.

Kim R. Radina brought an action in the Bay Circuit Court against Wieland Sales, Inc., a truck dealership, seeking to recover $63,750 for unpaid commissions after the dealership terminated his employment. Plaintiff had worked for defendant soliciting commercial-truck leases. Defendant had paid plaintiff a salary, plus 1 percent of the value of each lease he sold, payable over the term of each lease. After defendant had terminated plaintiff's employment, it had also ceased paying commission on the continuing leases, and plaintiff brought suit. Defendant moved for summary disposition, but the court, Joseph K. Sheeran, J., denied summary disposition, and following trial, the jury awarded $63,750 to plaintiff. Defendant appealed.

The Court of Appeals *held*:

1. The sales representatives commission act (SRCA), MCL 600.2961, governs when payment of a commission is due to a sales representative, recovery of damages for failure to comply with the act, and recovery of attorney fees and court costs. Under the SRCA, a "sales representative" is a person who contracts with or is employed by a principal for the solicitation of orders or sale of goods and is paid, in whole or in part, by commission. Under the common meanings of the terms, "goods" are articles of trade or merchandise and an "order" is a direction or commission to make, provide, or furnish something. Plaintiff's solicitation of commercial-truck leases was a solicitation of orders for a good. Thus, plaintiff was a sales representative under the act. To constitute a sales transaction under the SRCA, no transfer of title is required. Rather, a lease of a good constitutes an order of the good so as to render the sales representative in the transaction subject to the SRCA. The trial court properly denied summary disposition.

2. Absent a motion for remittitur or a new trial on the basis that the award of damages at trial was unsupported by the evidence, a party has waived the issue for appeal. In this case, defendant failed to move for a new trial or remittitur and thus had

waived the issue for appeal. Regardless, the terms of the leases that plaintiff procured for defendant were admitted into evidence, and a jury could reasonably have inferred that the leases were or would be paid and that commissions would be owed on the basis of those payments. Therefore, the jury had a reasonable basis for its award of damages.

Affirmed.

ACTIONS — SALES REPRESENTATIVES COMMISSION ACT — APPLICABILITY — LEASES.

Under the sales representatives commission act (SRCA), a "sales representative" is a person who contracts with or is employed by a principal for the solicitation of orders or sale of goods and is paid, in whole or in part, by commission; pursuant to the common meanings of the terms, "goods" are articles of trade or merchandise and an "order" is a direction or commission to make, provide, or furnish something; to constitute a sales transaction under the SRCA, no transfer of title is required; rather, a lease of a good constitutes an order of the good so as to render the sales representative in the transaction subject to the SRCA (MCL 600.2961).

Hurlburt, Tsiros & Allweil, P.C. (by *Lawrence A. Hurlburt* and *Mandel I. Allweil*), for Kim R. Radina.

Darbee, Bosco & Hammond, P.C. (by *James M. Hammond*), for Wieland Sales, Inc.

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

WILDER, P.J. Defendant, Wieland Sales, Inc., appeals as of right a final judgment following a jury trial, awarding plaintiff, Kim R. Radina, damages for defendant's violation of the sales representatives commission act (SRCA), MCL 600.2961. We affirm.

I. BASIC FACTS

In the fall of 1996, defendant, a truck dealership, recruited plaintiff to establish a commercial-truck rental and leasing business. On October 25, 1996, plaintiff agreed to work for defendant in exchange for a

compensation package including a regular salary and 1 percent of all lease revenues. The leases solicited by plaintiff were recorded by defendant as "sales," and the 1 percent payments made to plaintiff were recorded as "commission." Because of defendant's cash-flow concerns, plaintiff agreed to have the commission paid out over the term of the leases, rather than at the time the leases were executed. Plaintiff acknowledges that he only solicited leasing business for defendant and did not sell any trucks for defendant. Then, in December 2008, defendant terminated plaintiff's employment and ceased making the 1 percent payments on lease revenues generated under the leases solicited by plaintiff.

On March 31, 2009, plaintiff filed a complaint against defendant, alleging, in relevant part, that defendant's failure to continue making the 1 percent commission payments to plaintiff constituted a breach of the SRCA. On September 29, 2009, defendant moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that plaintiff was not protected by the SRCA because he never *sold* goods nor solicited contracts to *sell* goods at a future time. Plaintiff countered that the sale of leases for the use of goods was sufficient to bring him under the protection of the SRCA.

The trial court denied defendant's motion, reasoning as follows:

> The orders solicited by Radina for Wieland were for the use and servicing of trucks. A truck is a **good**, based on the plain meaning of that term and its definition in the Uniform Commercial Code. . . .
>
> Based on the Court's interpretation of the statute, leases for the usage and servicing of trucks are solicitations of orders for goods. Thus, the Court finds that Radina was employed by Wieland for the solicitation of orders for goods and is therefore a sales representative as that term is defined by the SRCA. Additionally, the nature of the leases

> sold by Radina (i.e. a combination of goods and services) are likewise within the purview of the Act. The fact that a service component was attached to the leases for the trucks does not make the leases any less solicitations of orders for goods. [Emphasis in original.]

At trial, plaintiff submitted evidence of the number and cash value of the leases he solicited for defendant, the amount of profit to date from those leases that he had not been paid commission on, and the amount of future profit from those leases that defendant would be entitled to if all of those leases were eventually paid in full. With these figures, plaintiff asserted that defendant's decision not to pay him commission following his termination would cost him $63,750 over the life of the leases. At the close of trial, the jury found for plaintiff and awarded him a verdict of $63,750. Defendant appeals as of right.

II. ANALYSIS

A. SALES REPRESENTATIVE

Defendant first argues that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(10). Specifically, defendant claims that plaintiff cannot avail himself of the protections of the SRCA because he is not a "sales representative," as defined by the act. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Mahnick v Bell Co*, 256 Mich App 154, 157; 662 NW2d 830 (2003). In reviewing a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the non-

moving party. *Id*. A motion for summary disposition under MCR 2.116(C)(10) should be granted if, there being no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id*. Resolution of this issue also involves statutory interpretation, which is reviewed de novo by the Court. *Id*. "The goal of statutory interpretation is to give effect to the intent of the Legislature . . . ." *Homer Twp v Billboards By Johnson, Inc*, 268 Mich App 500, 502; 708 NW2d 737 (2005). And, in determining the Legislature's intent, statutory provisions must be read in the context of the whole statute and harmonized with the statute's other provisions. *Harvlie v Jack Post Corp*, 280 Mich App 439, 445; 760 NW2d 277 (2008).

The SRCA, MCL 600.2961, reads, in relevant part:

> (1) As used in this section:
>
> (a) "Commission" means compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the amount of orders or sales or as a percentage of the dollar amount of profits.
>
> (b) "Person" means an individual, corporation, partnership, association, governmental entity, or any other legal entity.
>
> * * *
>
> (d) "Principal" means a person that does either of the following:
>
> (i) Manufactures, produces, imports, sells, or distributes a product in this state.
>
> (ii) Contracts with a sales representative to solicit orders for or sell a product in this state.
>
> (e) "Sales representative" means a person who contracts with or is employed by a principal for the solicitation of orders or sale of goods and is paid, in whole or in part, by commission. Sales representative does not include a person

> who places an order or sale for a product on his or her own account for resale by that sales representative.

There is no dispute that plaintiff is a person and that, because defendant was engaged in the sale and distribution of trucks throughout the state, plaintiff was also employed by a principal within the meaning of the SRCA. Plaintiff was also paid in part by commission, given that he was entitled to payment from defendant, the rate of which was expressed as a percentage of the dollar amount of profits generated by the leases he procured. Thus, the central factual question to be resolved in determining whether plaintiff was a "sales representative" under the SRCA is whether plaintiff was employed by defendant "for the solicitation of orders or sale of goods." In turn, the answer to that question depends on whether the solicitation of commercial-truck leases constitutes the solicitation of orders for a good. We answer both questions in the affirmative.

The terms "order" and "good" are not defined within the SRCA. When a term is not defined in the statute, with certain exceptions for technical terms, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. MCL 8.3a; *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). The word "goods" is defined as "articles of trade; merchandise." *Random House Webster's College Dictionary* (2001), p 565. "Order" is defined as "a direction or commission to make, provide, or furnish something." *Id*. at 932. Given these definitions, we conclude that plaintiff's activities amounted to directing, on defendant's behalf, that defendant furnish merchandise, in this case trucks, to customers who wished to do business with defendant. Because the merchan-

dise was furnished through a lease rather than a sale, no passing of title occurred during these transactions, but the SRCA does not require a transfer of title.

Defendant relies on the definition of "goods" found in MCL 440.2105(1)[1] of Michigan's Uniform Commercial Code (UCC) and, specifically, that definition's reference to a contract for "sale" to support its argument that the vehicles that were the subject of the leases were not goods because there was no "sale." However, that definition is found in article 2 of the UCC, which governs sales. But article 2A of the UCC, which governs leases, defines "goods" as "all things that are movable at the time of identification to the lease contract." MCL 440.2803(1)(h). Consequently, defendant's main argument, that a good can *only* be defined in terms of a sales contract, is without merit.[2]

Therefore, because plaintiff was a person employed by a principal for the solicitation of orders for goods, and was paid in part by commission, plaintiff was a sales representative under the language of the SRCA, and the trial court properly denied defendant's motion for summary disposition.

B. DAMAGES

Defendant next argues that the jury's award of $63,750 to plaintiff was unsupported by the evidence. However, defendant did not move for a new trial on this

[1] MCL 440.2105(1) states, " 'Goods' means all things . . . which are movable at the time of identification to the contract for sale . . . ."

[2] We also reject defendant's assertion at oral argument that article 2A only applies to "finance leases." MCL 440.2802 unambiguously states that "[article 2A] applies to any transaction, regardless of form, that creates a lease." And MCL 440.2803(1)(j) defines a "lease" as "a transfer of the right to possession and use of goods for a term in return for consideration."

basis or move for remittitur in the trial court. Absent such motions, defendant has waived the issue on appeal. *Klapp v United Ins Group Agency, Inc (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003). Moreover, even if we did address the issue, it is clear that the terms of the leases that plaintiff procured for defendant were admitted into evidence. Contrary to defendant's assertion, a jury could reasonably infer that the leases were or will be paid and that commissions would be owed on the basis of those payments. Therefore, the jury had a reasonable basis for its award of damages, and any claim of the award being unsupported by the evidence would fail.

Affirmed.

TALBOT and SERVITTO, JJ., concurred with WILDER, P.J.

In re APPLICATION OF DETROIT EDISON COMPANY TO INCREASE RATES

Docket No. 302110. Submitted April 11, 2012, at Lansing. Decided July 26, 2012, at 9:00 a.m. Leave to appeal granted, 493 Mich 950.

Detroit Edison Company filed an application with the Public Service Commission (PSC) seeking to increase electrical rates. When the PSC failed to act on the application within 180 days, Detroit Edison elected to self-implement a rate increase. The PSC subsequently issued an order approving a smaller rate increase than that self-implemented by Detroit Edison. Detroit Edison agreed to refund the excess funds that had been collected by allocating the total refund amount among customer classes on the basis of each class's pro rata share of the total revenue collected. The Association of Businesses Advocating Tariff Equity (ABATE), an intervening party, objected to the proposed refund methodology, asserting that MCL 460.6a(1) required Detroit Edison to calculate a refund for primary customers, i.e., approximately 3,000 large purchasers of electricity, on the basis of each primary customer's actual overpayment. The PSC rejected ABATE's argument and approved a refund based on rate schedule class. ABATE appealed.

The Court of Appeals *held*:

MCL 460.6a(1) states that a utility must refund to customers, with interest, any portion of total revenues collected under a self-implemented plan that exceed the total that would have been produced by the rates or charges subsequently ordered by the PSC in its final order. The PSC must allocate that refund among primary customers based on their pro rata share of the total revenue collected through the applicable increase. Section 6a(1) is ambiguous. The language of § 6a(1) could be viewed as requiring a return of monies previously paid. However, the term "refund" has previously been given a broader meaning within the context of PSC statutes. And the language requiring a refund to primary customers based on their pro rata share of the revenues collected can be read as requiring that individual primary customers be refunded the amounts they actually overpaid, or it can be read as requiring that all of the primary customers together be given a refund based on all of the primary customers' pro rata share of the

total revenue collected. Cogent reasons—including the avoidance of the imposition of burdensome administrative costs—supported the PSC's interpretation. The PSC's action was lawful and reasonable.

Affirmed.

SAAD, J., dissenting, asserted that the PSC's ruling defeated the public policy purposes and plain language of two statutes. The Customer Choice and Electricity Reliability Act (Choice Act), MCL 460.10 *et seq*., states that its purposes include ensuring that Michigan customers have a choice of electric suppliers and to foster competition. MCL 460.6a(1) requires that primary customers be reimbursed for the actual amount that they were overcharged by Detroit Edison under its self-implemented plan as opposed to the amounts resulting from the refund plan approved by the PSC. Further, by spreading the total refunds to all Detroit Edison customers in the future by reducing their rates according to a formula that takes the total overcharges and spreads it among Detroit Edison customers, those primary customers who overpaid and then switched electric suppliers will receive no refund, disincentivizing the choice and competition promoted by the Choice Act.

PUBLIC UTILITIES — SELF-IMPLEMENTED RATE INCREASES — REFUNDS — PRIMARY CUSTOMERS — PRO RATA SHARE.

MCL 460.6a(1) states that a utility must refund to customers, with interest, any portion of total revenues collected under a self-implemented plan that exceed the total that would have been produced by the rates or charges subsequently ordered by the Public Service Commission (PSC) in its final order; the PSC must allocate that refund among primary customers based on their pro rata share of the total revenue collected through the applicable increase; the language requiring a refund to primary customers based on their pro rata share of the revenues collected can be read as requiring that all of the primary customers together be given a refund based on all of the primary customers' pro rata share of the total revenue collected.

Clark Hill PLC (by *Robert A. W. Strong*) for the Association of Businesses Advocating Tariff Equity.

Bruce R. Maters, Jon P. Christinidis, and *Fahey Schultz Burzych Rhodes PLC* (by *William K. Fahey* and *Stephen J. Rhodes*) for the Detroit Edison Company.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Steven D. Hughey* and *Kristin M. Smith*, Assistant Attorneys General, for the Public Service Commission.

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

SAWYER, J. The Association of Businesses Advocating Tariff Equity (ABATE) appeals of right an order of the Michigan Public Service Commission (PSC) providing that Detroit Edison Company was to refund revenue it had collected through self-implemented rates; the rates were self-implemented while Detroit Edison was awaiting a final order on an application for a rate increase. Rather than requiring a refund to each customer based on that customer's overpayment, the PSC held that the refund was to be made prospectively in the January 2011 billing month to classes of customers based on the classes' pro rata share of the self-implemented increase. We affirm.

I. FACTS AND PROCEEDINGS

On January 26, 2009, Detroit Edison applied for an increase in electrical rates in the amount of $378,000,000. Under § 6a(1) of 2008 PA 286 (Act 286), MCL 460.6a(1), the PSC was required to act on this application by January 26, 2010. However, § 6a(1) also provided that Detroit Edison was entitled to self-implement an interim rate unless the PSC acted on its application within 180 days or issued an order preventing or delaying self-implementation for good cause. No such action was taken and no such order issued. Detroit Edison elected to self-implement $280 million of rate relief.

On January 11, 2010, the commission issued a final order approving a rate increase of only $217,392,000. Section 6a(1) required a refund because the new rate was less than the self-implemented rate. The refund amount, with interest, was determined to be $26,872,231.

With respect to the refund, Detroit Edison proposed to allocate the total refund amount among customer classes based upon each customer class's pro rata share of the total revenue collected. ABATE objected to this proposed refund methodology as it pertained to primary customers. It maintained that § 6a(1) required that Detroit Edison calculate a refund for each primary customer based upon each primary customer's actual overpayment and that it refund an amount equal to the actual overpayment to each primary customer. Regarding the refund, § 6a(1) states in pertinent part:

> If a utility implements increased rates or charges under this subsection before the commission issues a final order, that utility shall refund to customers, with interest, any portion of the total revenues collected . . . that exceed the total that would have been produced by the rates or charges subsequently ordered by the commission in its final order. *The commission shall allocate any refund required by this section among primary customers based upon their pro rata share of the total revenue collected through the applicable increase*, and among secondary and residential customers in a manner to be determined by the commission. [Emphasis added.]

The PSC held that the refund did not have to be "precisely tailored to each and every Detroit Edison customer who paid a self-implemented rate." It continued:

> Other than requiring that the refund to primary customers be based on their pro rata share of the total revenues collected through the applicable increase, the

> statute leaves the method of the refund up to the Commission's discretion. MCL 460.6a(1). The Commission has long rejected the notion that historical perfection must be achieved with refunds or surcharges. The Commission has authority to exercise discretion in fashioning a refund procedure, and the most precise procedure may have disadvantages, such as attendant costs or administrative burdens, that outweigh the apparent advantages. See, *Attorney General v Public Service Comm*, 235 Mich App 308; 597 NW2d 264 (1999) [*Mich Gas*]; *Attorney General v Public Service Comm*, 215 Mich App 356; 546 NW2d 266 (1996) [*Mich Consol*]; May 17, 2005 order in Case No. U-13990, pp. 21-22. And, as the Staff correctly notes, the refund must be allocated based on the pro rata share of the revenue from the self-implemented increase, not on the precise dollar amount paid in excess revenue; thus, ABATE's argument in favor of a refund that reflects what each primary customer "actually paid" is inconsistent with the language of the statute. Finally, were the Commission persuaded to order a refund based on the amount each primary customer paid during self-implementation, the administrative costs associated with making those individual determinations would be addressed in a future rate case, and, under basic principles of cost causation, would likely be borne by the primary class.
>
> The Commission approves the refund procedure proposed by the Staff and agreed to by the company, which bases the refund on rate schedule class, and forecasts sales for the refund month. Further, the Commission approves the use of the [Power Supply Cost Recovery] reconciliation proceeding as a mechanism to complete the refund, in order to make the refunded amount as exact as possible.

ABATE claimed that two unidentified ABATE members who were primary customers subject to the self-implemented rates signed up for service from alternative electric suppliers during the period that these rates were in place rather than continuing to receive bundled service from Detroit Edison. ABATE pointed out that under the refund methodology approved by the PSC,

these two primary customers would not receive a refund because they were no longer in the class of customers that would receive the refund. ABATE argued that their exclusion was arbitrary and capricious. The PSC held:

> The Commission does not agree with ABATE that primary customers who chose to switch from bundled to choice service during the period of self-implementation are treated unfairly under this refund method. There was nothing hidden from such customers. The possibility that the rate increase adopted in the final order would differ from the unapproved rate increase self-implemented by the company was always present, as was the possibility that the final rate design would differ, however slightly, from the self-implemented rate design. Such customers would have (or should have) been aware of that fact at the point in time when they decided to switch. Indeed, any customer who made that switch early in the self-implementation period likely underpaid during the self-implementation period, since only one [retail open access] rate schedule overpaid during self-implementation.

II. STANDARD OF REVIEW

In *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App 106, 109-110; 804 NW2d 574 (2010), the Court stated:

> The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. See also *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a

> statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). A reviewing court gives due deference to the PSC's administrative expertise, and should not substitute its judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).
>
> A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Application of Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

It is noted that in *Attorney General v Pub Serv Comm*, 206 Mich App 290, 296; 520 NW2d 636 (1994), the Court explained that MCL 462.26(8) "requires a reviewing court to determine only whether an order is unlawful or unreasonable, not whether it is arbitrary and capricious."

The standard of review for an agency's interpretation of a statute was recently set forth in *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), quoting *Boyer-Campbell v Fry*, 271 Mich 282, 296-297; 260 NW 165 (1935):

> "[T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature."

> This standard requires "respectful consideration" and "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue. [Citation omitted; second alteration in original.]

III. ANALYSIS

ABATE first argues that the phrase "shall allocate any refund . . . among primary customers based upon their pro rata share of the total revenue collected through the applicable increase," MCL 460.6a(1), means that each primary customer must be given back the amount it actually overpaid pursuant to the self-implemented rate. However, the propriety of fashioning a refund by including it in a prospective billing for a class of customers depends on the interpretation given this statute. In *In re Review of Consumers Energy Co Renewable Energy Plan*, 293 Mich App 254, 269; 820 NW2d 170 (2011), quoting *In re Temporary Order to Implement 2008 PA 295*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2010 (Docket No. 290640), pp 4-7, the Court stated:

> When interpreting statutory language, this Court's primary goal is to give effect to the intent of the Legislature. "The first step is to review the language of the statute. If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute." *Briggs Tax Serv, LLC v Detroit Pub Schools*, 485 Mich 69, 76; 780 NW2d 753 (2010) . . . . This Court accords to every word or phrase of a statute its plain and ordinary meaning, unless a term has a special, technical meaning, or is defined in the statute. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999); *Stocker v Tri-*

> *Mount/Bay Harbor Bldg Co, Inc*, 268 Mich App 194, 199; 706 NW2d 878 (2005). See also MCL 8.3a; *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 189-190; 740 NW2d 678 (2007). Furthermore, statutory language is to be read in context, and "statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) . . . .

In *Detroit Edison Co v Pub Serv Comm*, 261 Mich App 1, 8-9; 680 NW2d 512 (2004), vacated in part on other grounds 472 Mich 897 (2005), the Court stated:

> If the language of the statute is ambiguous, judicial construction to determine its meaning is appropriate. In re MCI [460 Mich 396, 411; 596 NW2d 164 (1999)]. The Legislature is presumed to be familiar with the rules of statutory construction and is charged with knowledge of existing laws on the same subject. *Inter Coop Council v Dep't of Treasury*, 257 Mich App 219, 227; 668 NW2d 181 (2003). In addition, the Legislature is presumed to act with knowledge of administrative and appellate court statutory interpretations. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991).

We conclude that § 6a(1) is ambiguous and that it is subject to reasonable but differing interpretations. It calls for a "refund" to "customers" and, with respect to "primary customers" requires that the refund be "based upon their pro rata share of the total revenue collected through the applicable increase." This could be viewed as requiring a "refund" in the traditional sense, i.e., a return of monies previously paid. In this regard, *The American Heritage Dictionary, Second College Edition*, defines refund when used as a verb as "**1.** To return or give back. **2.** To repay (money). . . . To make repayment." When used as a noun, it is defined as "**1.** A repayment of funds. **2.** An amount repaid." However, MCL 460.6h(13) also calls for a refund under certain circumstances. Yet, in *Mich Con-*

sol, 215 Mich App 356, and *Mich Gas*, 235 Mich App 308, the Court concluded that § 6h(13) allowed for an adjustment of future rates and did not require a return of actual monies paid. Thus, within the context of PSC statutes, the term "refund" enjoys a broader meaning. There is nothing in the statute that compels the conclusion that use of the term "refund" means the monies returned to a primary customer must be based on the individual primary customer's actual overpayment.

Nonetheless, § 6a(1) requires that the refund to "primary customers" be based on "their" "pro rata" share of revenues collected. "Primary customers" could be interpreted to mean the individual primary customers, given that the statute refers to "primary customers" and not the class of primary customers. Conversely, the absence of the phrase "individual primary customers" allows for the "primary customers" to be viewed and treated as a group. Further, "their pro rata share" could be interpreted to mean the amount of self-implemented increase in rates that each individual customer actually paid. However, the statute could also be read as requiring that *all* of the primary customers together be given a refund based on *all* of the primary customers' pro rata share of the total revenue collected.

We conclude that there are cogent reasons supporting the agency interpretation. Although ABATE disagrees, Alan Droz, an auditor manager with the PSC, testified that implementing individual refunds to all primary customers would result in burdensome administrative costs. As the PSC noted, these costs would not be borne by the individual customers who received a refund but would be addressed in a future rate case. ABATE suggests that there is a cogent reason for overruling the PSC because basing the refund on a

prospective refund month applicable to only bundled customers will result in no refund to primary customers who switched to choice or retail open access service during the interim period. However, Droz indicated that these primary choice customers would have factored the potential loss of a refund into their decision to switch to choice. This presumption is supported by the fact that "refunds" given by way of a prospective adjustment were approved in *Mich Consol*, 215 Mich App 356, and *Mich Gas*, 235 Mich App 308. Moreover, the Legislature is presumed to have been familiar with this treatment of the term "refund" when it enacted § 6a(1). See *Detroit Edison Co v Pub Serv Comm*, 261 Mich App at 8-9. Thus, we find no cogent reason for overruling the PSC's interpretation of the statute and conclude that the PSC's action was both lawful and reasonable.

Affirmed.

HOEKSTRA, P.J., concurred with SAWYER, J.

SAAD, J. (*dissenting*). I respectfully dissent from the majority. We generally will not second-guess rulings by administrative agencies, but instead grant deference to them premised on their special expertise. Yet, when, as here, a ruling by an administrative agency defeats the public policy purposes and plain language of two key statutes, our Court must do its duty and prevent such a repudiation of the Legislature's clear mandate. After all, in the final analysis, the administrative agency should uphold, not undermine, the law the Legislature passed.

Having said this, the express language of the Customer Choice and Electricity Reliability Act (Choice Act) makes clear its public purpose is to ensure that all Michigan customers of electric power "have a choice of

electric suppliers." MCL 460.10(2)(a). The Choice Act also says its aim is to encourage competition. MCL 460.10(2)(b). Also key to our review of the agency's conduct here, the Choice Act specifically enumerates as one of its purposes to "encourage the Michigan public service commission to foster competition . . . ." *Id*. Thus, when the PSC deals with a customer of an electric utility that has exercised its legislatively encouraged choice under the Choice Act to buy electricity from a competitor of Detroit Edison, the PSC must, in its decisions, be faithful to its statutory mission to "foster competition."

In this case, a few of the primary customers[1] of Detroit Edison sought refunds of the actual amount that they overpaid Detroit Edison for electric power before they switched to buying electricity from another electric company. Their statutory right to a refund for those overpayments is set forth clearly in 2008 PA 286 (Act 286). The overpayments occurred because, for the first time in Michigan, Act 286 allows an electric utility to self-implement a rate increase, subject to later reduction by the PSC. The risk to the electric utility is that it will have to refund to its customers the amounts overpaid during this self-implementation period. Indeed, Act 286 expressly says that the utility "shall refund" customers if the PSC does not grant the full rate increase represented in the self-implemented rate. MCL 460.6a(1).

And, under applicable administrative law, the PSC generally determines how refunds will be calculated, but, importantly, Act 286 also sets forth how the PSC should calculate these refunds under the new self-implementation statute. With regard to all commercial

[1] "Primary customers," numbering roughly 3,000, are large purchasers of electricity.

and residential customers, roughly three million users, Act 286 affords the PSC its usual broad authority to adopt a methodology for refunds. Significantly, as to primary customers, Act 286 carves out a different way to calculate refunds, which makes it quite clear that these primary customers should simply be reimbursed for the actual amount they were overcharged. This is called the "historical approach." In other words, these primary customers know exactly how much they overpaid each month and how much less they would have paid in light of the lesser increase granted by the PSC. It is this amount they seek as a refund—the amount they overpaid—and this is the amount and the methodology that the statute requires the PSC to use. Instead, the PSC ruled that it will use the "prospective refund methodology," which means that the primary customers who were overcharged by Detroit Edison before they switched to competitors get no refund whatsoever. The PSC ruled that it will spread the total refunds to all Detroit Edison customers in the future by reducing their rates according to a formula that takes the total overcharges (the money that Detroit Edison charged over the rate eventually approved by the PSC) and spreading it among Detroit Edison customers. Thus, notwithstanding the specific refund calculation required by Act 286 for primary customers, those primary customers who overpaid and then switched electric suppliers will receive no refund. Therefore, the PSC ruling disincentivizes the very choice and competition the Choice Act expressly promotes and denies the very refunds Act 286 promised to primary customers. The net result is that in one fell swoop the PSC defeats the express language and public policy of two key statutes.

Under the umbrella of deference to the PSC, the majority endorses this ruling, with its counterintuitive result and its repudiation of the public policy underly-

ing the Choice Act and Act 286. I strongly dissent because the largest users of electricity who make the move to a Detroit Edison competitor end up losing the most. The overcharges and overpayments are never refunded. This will serve to discourage "choice" and "competition" among the largest users of electricity in this state, the very legislative objectives at the center of the Choice Act.

Again, to justify this result, the PSC cites its discretion to adopt a methodology for refunds, despite the fact that Act 286 carves out a particular method for refunds to primary customers in connection with the new self-implementation program. The PSC further justifies its unfair methodology on the self-serving theory that primary customers should have known that the PSC has broad discretion and that it likely would not have granted primary customers a refund (despite the act's language which seems to guarantee a refund). According to the PSC, primary customers must have factored this in to their decisions to switch electric suppliers and, therefore, did not really lose anything at all by the PSC's decision not to give them refunds. Not only is this rationale a form of reasoning backward from a desired result but, again, it violates the clear language of two statutes. Under our system of laws, an administrative agency, while it has broad power, does not have plenary power and certainly does not have the power to trump the Legislature it serves by undermining two statutes, by discouraging competition, and by denying a refund to the largest utility customers in our state.

VITTIGLIO v VITTIGLIO

Docket Nos. 303724 and 304823. Submitted June 13, 2012, at Detroit. Decided July 31, 2012, at 9:00 a.m. Leave to appeal denied, 493 Mich 936.

Plaintiff, Cynthia N. Vittiglio, moved in the Oakland Circuit Court to set aside the judgment of divorce entered pursuant to a settlement agreement reached between her and defendant, Thomas A. Vittiglio, during mediation. Plaintiff had moved to set aside the settlement and dismiss the case before the judgment was entered. The court, Cheryl A. Matthews, J., denied the motions, finding that plaintiff's attempts to disavow the settlement and dismiss the case were frivolous. The court ordered the settlement agreement recorded at mediation to be merged and incorporated into the judgment of divorce that was entered. The court awarded sanctions to defendant on the basis that plaintiff's frivolous motions and refusal to sign the settlement agreement resulted in additional expenses for defendant. Plaintiff appealed the judgment of divorce (Docket No. 303724) and the award of sanctions (Docket No. 304823), and the appeals were consolidated.

The Court of Appeals *held*:

1. Under MCR 3.216(A)(1), all domestic relations cases, as defined in MCL 552.502(*l*), now MCL 552.502(m), are subject to mediation under MCR 3.216. MCR 3.216(H)(7)) requires that for the terms of a settlement agreement to be binding, the terms of that settlement agreement must be reduced to a signed writing by the parties or acknowledged by the parties on an audio recording. Pursuant to MCL 552.502(m)(*i*), domestic relations matters include circuit court proceedings in which spousal support is in issue and that arise out of litigation under a statute of this state, including but not limited to MCL 552.1 to 552.45. Spousal support was a disputed issue during mediation and was addressed and decided in the settlement agreement. In addition, the litigation included the issue of property division which is addressed for divorce actions in MCL 552.19 and MCL 552.23. The proceeding was clearly a domestic relations matter pursuant to both MCL 552.502(m)(*i*) and MCR 3.216 and the requirements of MCR 3.216 apply to the settlement agreement placed on the record during mediation.

2. The statute of frauds, MCL 566.106, requires that the conveyance of an interest in land must be by a deed or a conveyance in writing or by act or operation of law. MCR 3.216(7) provides that the terms of a domestic relations settlement agreement reached by mediation are binding if (1) reduced to a signed writing, or (2) acknowledged by the parties on an audio or video recording. Both parties acknowledged the property settlement on a recording in accordance with MCR 3.216(H)(7). The statute of frauds was not violated because the property settlement occurred by act or operation of law pursuant to the court rule.

3. Settlement agreements should not normally be set aside. Once the agreement is reached and put in writing and signed by the parties or their representatives, or orally placed on the record and consented to by the parties, it may not be disavowed merely because a party has had a change of heart. Courts must uphold divorce property settlements because modifications of property settlements in divorce judgments are disfavored. The court did not err by finding that the parties reached a binding settlement agreement when they acknowledged the terms of the agreement in an audio recording in accordance with MCR 3.216(H)(7).

4. In the absence of fraud, duress, mutual mistake, or severe stress, which can prevent a party from understanding in a reasonable manner the nature and effect of the act in which he or she was engaged, courts are bound by property settlements reached through the parties' negotiations in a divorce action. When a party to a consent judgment argues that consent was achieved through duress or coercion practiced by her attorney, the judgment will not be set aside absent a showing that the other party participated in the duress or coercion. The court was not required to conduct an evidentiary hearing on plaintiff's assertion of lack of consent to the settlement agreement because plaintiff failed to request one. The court properly determined that there was no basis for invalidating plaintiff's consent to the settlement. There was no support in the record for plaintiff's claim that defendant's alleged prior threats affected the validity of her consent to the settlement agreement in light of the type of mediation used. There was no evidence that defendant had been involved in any communication to plaintiff of a supposed advantage of settling the case instead of proceeding to trial or that defendant had colluded with plaintiff's attorney to coerce her to settle. It was appropriate for plaintiff's attorney to negotiate within the settlement an agreement that defendant would pay his fees directly.

5. Severe stress can affect a party's mental capacity to contract and make consent to a settlement agreement illusory when a

person does not possess sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he or she is engaged. There was no evidence that plaintiff's consent to the property settlement was illusory. Plaintiff had indicated in the audio recording that she understood the terms of the agreement and had no questions for her attorney or the mediator.

6. If a property settlement in a divorce action appears unconscionable, a court may review the equities of the settlement when one of the parties later attempts to disavow it. A contract may be procedurally unconscionable or substantively unconscionable. An agreement is procedurally unconscionable when the weaker party has no alternative but to accept the agreement. Substantive unconscionability occurs when a term of the settlement agreement is so inequitable and extreme that it shocks the conscience. Under MCR 3.216(A)(2), domestic relations mediation is a nonbinding process. The court did not clearly err by finding that the agreement was not unconscionable. The settlement agreement was not so inequitable that it shocked the conscience.

7. An action for fraud must be predicated on a false statement relating to past or existing fact. Plaintiff failed to provide any proof that her consent to the property settlement was procured by fraud. She did not aver that she had consented to the settlement because she was misled into believing that a valid prenuptial agreement existed.

8. A party must receive some type of reasonable notice and an opportunity to be heard before sanctions may be imposed under MCR 2.114. The court was not required to hold a separate hearing when it was satisfied that it was able to sufficiently decide the issue of sanctions on the evidence before it. Plaintiff was afforded reasonable notice and an opportunity to be heard before sanctions were imposed. The court's finding that plaintiff's motion to disavow the settlement agreement and to dismiss the divorce case had frivolous motives was not clearly erroneous and the order granting defendant sanctions was proper.

9. MCR 2.114(D) provides that the signature of an attorney or a party constitutes a certification by the signer (1) that he or she has read the document, to the best of his or her knowledge, information, and belief formed after reasonable inquiry, (2) that the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and (3) that the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The filing of a signed document that is not well grounded in fact and

law subjects the filer to sanctions under MCR 2.114(E). The trial court did not clearly err by concluding that plaintiff filed the motions because she regretted her agreement to the terms of the settlement, and to delay entry of the judgment of divorce to harass defendant. Plaintiff's argument that she agreed to the settlement because she was in fear for her life was inconsistent with the shuttle diplomacy method of mediation used in this case as well as with her subsequent motion to dismiss the case to reconcile with defendant and supported the court's finding that the motions were not well grounded in fact contrary to MCR 2.114(D).

10. An award of attorney fees as sanctions under MCR 2.114(E) must be reasonable and consider the factors set forth in MRPC 1.5(a). It is acceptable for the court to take judicial notice of facts that can be accurately determined by sources of unquestionable reliability, for example, statistics. The fees customarily charged in the locality can be established by empirical data found in surveys. The burden of proving the reasonableness of the requested fees is on the requesting party and the court has discretion to order sanctions in an amount less than that which was requested. The court did not abuse its discretion by awarding costs and attorney fees to defendant. Plaintiff's counsel was allowed to question defendant's attorneys about their billing statements and there was no evidence to support plaintiff's assertion that the court placed the burden on plaintiff to show that the requested fees were not reasonable. The court properly considered the State Bar of Michigan Economics of Law Practice Survey when evaluating the reasonableness of defendant's attorney fees and in determining that defendant had met his burden. The court awarded sanctions in an amount less than that which defendant requested and was therefore clearly aware that it was within its discretion to deviate below the requested amount.

Affirmed.

1. DIVORCE — DOMESTIC RELATIONS — SETTLEMENT AGREEMENTS — AUDIO RECORDINGS.

Under MCR 3.216(A)(1), all domestic relations cases, as defined in MCL 552.502(*l*), now MCL 552.502(m), are subject to mediation under MCR 3.216; MCR 3.216(H)(7) requires that for the terms of a settlement agreement to be binding, the terms of that settlement agreement must be reduced to a signed writing by the parties or acknowledged by the parties on an audio recording; domestic relations matters include circuit court proceedings in which spousal support is in issue and that arise out of litigation under a statute of this state, including but not limited to MCL 552.1 to

552.45; a divorce judgment settlement agreement that addresses spousal support and property distribution is a domestic relations case for purposes of MCR 3.216(A).

2. DIVORCE — SETTLEMENT AGREEMENTS — STATUTE OF FRAUDS.

The statute of frauds, MCL 566.106, requires that the conveyance of an interest in land must be by a deed or a conveyance in writing or by act or operation of law; MCR 3.216(7) provides that the terms of a domestic relations settlement agreement reached by mediation are binding if (1) reduced to a signed writing, or (2) acknowledged by the parties on an audio or video recording; a property settlement in a domestic relations matter that is acknowledged by the parties on the record in accordance with MCR 3.216(7) does not violate the statute of frauds because the settlement occurred by act or operation of law pursuant to the court rule.

3. SANCTIONS — HEARING — REASONABLE NOTICE.

A party must receive some type of reasonable notice and an opportunity to be heard before sanctions may be imposed under MCR 2.114; the court is not required to hold a separate hearing if it is satisfied that it can sufficiently decide the issue of sanctions on the evidence before it.

4. SANCTIONS — DOCUMENTS — WELL GROUNDED IN FACT.

MCR 2.114(D) provides that the signature of an attorney or a party constitutes a certification by the signer (1) that he or she has read the document, to the best of his or her knowledge, information, and belief formed after reasonable inquiry, (2) that the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and (3) that the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; the filing of a signed document that is not well grounded in fact and law subjects the filer to sanctions under MCR 2.114(E).

5. SANCTIONS — ATTORNEY FEES — REASONABLENESS — BURDEN OF PROOF.

An award of attorney fees as sanctions under MCR 2.114(E) must be reasonable and the court must consider the factors set forth in MRPC 1.5(a) when making the award; the court may take judicial notice of facts that can be accurately determined by sources of unquestionable reliability, for example, statistics; the fees customarily charged in the locality can be established by empirical data found in surveys like the State Bar of Michigan Economics of Law Practice Survey; the burden of proving the reasonableness of the

> requested fees is on the requesting party and the court has discretion to order sanctions in an amount less than that which was requested.

Judith A. Curtis and *Trish Oleska Haas* for Cynthia Neal Vittiglio.

Gilbert Gugni and *Scott Bassett* for Thomas Anthony Vittiglio.

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. These consolidated appeals arise out of a judgment of divorce entered pursuant to a settlement agreement reached between the parties during mediation. After the settlement was reached but before the judgment was entered, plaintiff had sought to disavow and set aside the settlement and dismiss the case. The trial court denied plaintiff's motions to do so and, pursuant to its finding that the motive behind the motion was frivolous, awarded sanctions to defendant. In Docket No. 303724, plaintiff appeals as of right the judgment of divorce, and in Docket No. 304823, plaintiff appeals as of right the trial court's award of sanctions. We affirm.

The parties were married in 1988 and had no children together. Plaintiff filed for divorce in 2010. The parties proceeded to mediation on January 26, 2011, which culminated in an audio recording of a settlement agreement as to all issues in the matter. The parties' attorneys stated on the recording that it had accurately described the agreement and covered everything. Both parties agreed that they understood everything that had been recorded and agreed to all the terms as full, final, and binding. However, when defendant moved to enforce the settlement agreement and for entry of the

divorce judgment, plaintiff refused to sign the consent judgment and sought to disavow the agreement. Defendant subsequently sought to recover from plaintiff all his costs incurred in maintaining the status quo beyond the date specified in the agreement and attorney fees. Plaintiff sought to dismiss the action, which the trial court denied. The trial court entered a judgment of divorce and ordered the settlement agreement recorded at mediation to be merged and incorporated into that judgment. The trial court also found plaintiff's attempts to disavow the settlement agreement and to dismiss the case were frivolous, and awarded defendant sanctions.

Plaintiff first argues on appeal that the trial court erred by finding the audiorecorded settlement agreement binding, arguing that although mediation may culminate in a settlement agreement that will be binding if "acknowledged by the parties on an audio or video recording," MCR 3.216(H)(7), that process is only available in "domestic relations cases, as defined in MCL 552.502(*l*),"[1] MCR 3.216(A)(1). Plaintiff argues that because this is not a domestic relations case pursuant to that definition, MCR 2.507(G) required that their binding settlement be made in writing or placed on the record in open court. Plaintiff additionally argues that the statute of frauds, see MCL 566.106, MCL 566.108, and MCL 566.132, precludes enforcement of the settlement agreement. We disagree with plaintiff's arguments.

"The finding of the trial court concerning the validity of the parties' consent to a settlement agreement will not be overturned absent a finding of an abuse of discretion." *Keyser v Keyser*, 182 Mich App 268, 270; 451 NW2d 587 (1990). "The construction and applica-

[1] This statutory provision is now MCL 552.502(m).

tion of a court rule are questions of law that [the Court of Appeals] reviews de novo on appeal." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 456; 733 NW2d 766 (2006). We review for clear error the factual findings underlying a trial court's application of a court rule. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 387; 761 NW2d 353 (2008); MCR 2.613(C).

"Domestic relations matter[s]" include circuit court proceedings as to, among other things, spousal support, arising "out of litigation under a statute of this state, including, but not limited to . . . MCL 552.1 to 552.45." MCL 552.502(m)(*i*). Plaintiff sought an award of permanent spousal support in her complaint for divorce, spousal support was identified as a disputed issue in the scheduling order that referred the case to mediation, and spousal support was addressed and decided in the recording of the parties' settlement agreement. Furthermore, MCL 552.19 and MCL 552.23 address property division in divorce actions. Consequently, it is clear that this proceeding *is* a domestic relations matter pursuant to both MCL 552.502(m)(*i*) and MCR 3.216. Accordingly, we reject plaintiff's argument that MCR 3.216 does not apply to the settlement in this case.[2] Both parties also unambiguously acknowledged the agreement in the audiorecording, as required by MCR 3.216(H)(7).

We likewise reject plaintiff's statute of frauds argument. The property settlement involved the parties' interest in lands, so we agree that it is subject to the statute of frauds. However, MCL 566.106 provides that, as an alternative to "a deed or conveyance in writing," an estate or interest in lands may also be conveyed "by

[2] We additionally observe that plaintiff failed to comply with the procedure specified by MCR 3.216(D)(1) for objecting to mediation.

act or operation of law." MCR 3.216(H)(7) provides that the terms of a settlement reached as a result of mediation are binding if (1) reduced to a signed writing or (2) acknowledged by the parties on an audio or video recording. The parties acknowledged their settlement agreement on an audio recording, which is one of the options set out in MCR 3.216(H)(7) for making their settlement binding. Consequently, the property settlement occurred "by act or operation of law" when the parties acknowledged their settlement on a recording. The statute of frauds was not violated.

"[S]ettlement agreements should not normally be set aside and . . . once a settlement agreement is reached a party cannot disavow it merely because [s]he has had 'a change of heart.' " *Metro Life Ins Co v Goolsby*, 165 Mich App 126, 128; 418 NW2d 700 (1987). Courts must uphold divorce property settlements reached through negotiation and agreement of the parties because modifications of property settlements in divorce judgments are disfavored. *Baker v Baker*, 268 Mich App 578, 586; 710 NW2d 555 (2005). "This rule applies whether the settlement is in writing and signed by the parties or their representatives or the settlement is orally placed on the record and consented to by the parties, even though not yet formally entered as part of the divorce judgment by the lower court." *Keyser*, 182 Mich App at 270. Here, the parties made their settlement binding by acknowledging it on an audio recording as provided in MCR 3.216(H)(7). The trial court did not err by finding that the parties reached a binding settlement agreement.

Plaintiff relatedly argues that the trial court erred by failing to set aside the settlement agreement under well-established contract principles. Plaintiff argues that she did not actually consent to the settlement

agreement because (1) defendant had threatened her life in the past and she developed an extreme fear of him, (2) the mediator and her attorney told her that the settlement offer was greater than what she would receive at a trial, and (3) she felt "severely betrayed" because her attorney negotiated a $50,000 payment for attorney fees. We find no merit to her arguments.

"It is a well-settled principle of law that courts are bound by property settlements reached through negotiations and agreement by parties to a divorce action, in the absence of fraud, duress, mutual mistake, or severe stress which prevented a party from understanding in a reasonable manner the nature and effect of the act in which she was engaged." *Keyser*, 182 Mich App at 269-270; see also *Calo v Calo*, 143 Mich App 749, 753-754; 373 NW2d 207 (1985). However, the parties must have actually consented to the settlement agreement. *Howard v Howard*, 134 Mich App 391, 397; 352 NW2d 280 (1984). "The finding of the trial court concerning the validity of the parties' consent to a settlement agreement will not be overturned absent a finding of an abuse of discretion." *Keyser*, 182 Mich App at 270. A trial court's factual findings are reviewed for clear error. *Smith v Smith*, 278 Mich App 198, 204; 748 NW2d 258 (2008). The trial court did not conduct an evidentiary hearing on plaintiff's claims that she did not actually consent, but the trial court was not obligated to because plaintiff never requested one. See *Mitchell v Mitchell*, 198 Mich App 393, 399-400; 499 NW2d 386 (1993) (noting that the trial court is not obligated to hold an evidentiary hearing to resolve a factual dispute or ambiguity in a divorce proceeding unless requested by a party).

Plaintiff averred in an affidavit that defendant had threatened to kill her on more than one occasion in the

past. However, the settlement agreement was reached through mediation, during which plaintiff was represented by counsel and the mediator conducted "shuttle diplomacy," which entailed the parties not even being in the same room.[3] Plaintiff never claimed that defendant had threatened her into agreeing to the settlement. The day after she filed an affidavit relating her extreme fear of defendant, she moved to dismiss on the ground that she wished to reconcile with defendant. While these two things are not necessarily mutually exclusive, and we recognize that extricating one's self from a domestic violence situation is often exceedingly difficult and sometimes fraught with actions that are seemingly baffling to outsiders, under the particular circumstances of this specific case we find no support in the record for plaintiff's claim that defendant's prior threats affected the validity of her consent to the settlement agreement, particularly because of the method of mediation used in this case.

Plaintiff also averred in her affidavit that the mediator and her attorney repeatedly told her that the proposed settlement was better than that which she could expect at a trial. When a party to a consent judgment argues that consent was achieved through

[3] The Supreme Court Administrative Office (SCAO)'s Standards of Conduct for Mediators do not specify any particular manner for handling mediation when domestic violence or control exists. However, the SCAO's Model Screening Protocol for domestic-relations mediation when domestic violence or control exists contains a number of suggestions for keeping parties safe, accommodated, and capable of negotiating and making decisions free from fear or coercion. It appears that the mediator took proper care to ensure that the mediation was free from coercion. See Office of Dispute Resolution, State Court Administrative Office, Michigan Supreme Court, *Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation: Model Screening Protocol* (January 2006), <http://courts.michigan.gov/scao/resources/standards/odr/dvprotocol.pdf>

duress or coercion practiced by her attorney, the judgment will not be set aside absent a showing that the other party participated in the duress or coercion. *Howard*, 134 Mich App at 397; *Grand Rapids Growers, Inc v Old Kent Bank & Trust Co*, 99 Mich App 128, 129-130; 297 NW2d 633 (1980). There is no indication that defendant was involved in any communication to plaintiff of a supposed advantage of settling the case instead of proceeding to trial. There is also no basis for disturbing the trial court's finding that plaintiff was an educated and intelligent person represented by an experienced attorney before an experienced mediator. We further agree with the trial court's observation that a certain amount of pressure to settle is fundamentally inherent in the mediation process, and is practically part of the definition. See MCR 3.216(A)(2) ("Domestic relations mediation is a nonbinding process in which a neutral third party facilitates communication between parties to promote settlement."). That pressure to settle is not, by itself, coercion.

Plaintiff additionally raised concerns over the provision in the agreement whereby defendant would pay $50,000 directly to plaintiff's attorney. Plaintiff felt betrayed by her attorney because he never told her that she owed him a fee beyond his retainer, and she believed that the payment indicated that defendant had participated in coercing her to settle. As the trial court observed, there was nothing unusual about plaintiff's counsel negotiating a provision requiring defendant to be responsible for some or all of plaintiff's attorney fees. See MCR 3.206(C)(2)(a) (requiring that a party who requests attorney fees and expenses must allege facts to show that he or she is unable to bear the expense of the action and the other party is) and *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999) ("A party in a domestic relations matter who is unable to bear the

expense of attorney fees may recover reasonable attorney fees if the other party is able to pay."). There is no indication that defendant was involved in negotiating the direct payment of attorney fees as part of the settlement.

Plaintiff claims that her ability to consent to the settlement agreement was impaired by severe stress. However, the test for whether consent was illusory because of severe stress is that of mental capacity to contract. *Howard*, 134 Mich App at 396. That is, "whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he [or she] is engaged." *Id*. (citation and quotation marks omitted). Plaintiff would therefore have to show that she did not even comprehend the nature or terms of the agreement. *Id*. Plaintiff simply has not shown anything of the sort; to the contrary, the mediator questioned plaintiff about her understanding of the terms of the settlement agreement, plaintiff affirmatively indicated that she understood the terms, had no questions for her attorney or the mediator, and agreed to all of the terms as a full and final binding settlement of the case. Plaintiff's consent to the agreement cannot be invalidated on the basis of her stress.

Plaintiff next argues that the settlement agreement was unconscionable. This Court has at least implied that a court may review the equities of property settlements in divorce actions when parties "later attempt to renege on such agreements" if they appear unconscionable. See *Tinkle v Tinkle*, 106 Mich App 423, 428; 308 NW2d 241 (1981). "The examination of a contract for unconscionability involves inquiries for both procedural and substantive unconscionability." *Hubscher & Son, Inc v Storey*, 228 Mich App 478, 481; 578 NW2d 701

(1998). "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the [settlement agreement]." *Clark v Daimler-Chrysler Corp*, 268 Mich App 138, 144; 706 NW2d 471 (2005). Substantive unconscionability exists where the challenged term is not substantively reasonable. *Id*. The term must be more than merely disadvantageous; rather, "the inequity of the term [must be] so extreme as to shock the conscience." *Id*.

MCR 3.216(A)(2) specifically provides that "[d]omestic relations mediation is a nonbinding process . . . ." Plaintiff was not under any obligation to accept the settlement agreement, and she always had the option of proceeding to trial. Plaintiff claimed, without any evidentiary support, that the marital estate had an estimated value of $6 million, making the settlement shocking after a 23-year marriage. The settlement agreement provided plaintiff with cash funds of $1.2 million, required defendant to be responsible for $50,000 of plaintiff's attorney fees, provided that plaintiff was to receive the contents of the parties' Florida home and either a country club membership or an additional $20,000, and permitted plaintiff to retain all her bank and brokerage accounts, and her retirement account. Even presuming plaintiff received less than half of the mathematical value of the marital estate, we are not persuaded that she received such an inequitable distribution that the trial court can be said to have clearly erred by finding that the agreement was not unconscionable.

Plaintiff also argues that the trial court erred by failing to invalidate the settlement agreement on the basis that it was procured by fraud. "[A]n action for fraud must be predicated upon a false statement relating to a past or existing fact." *Cummins v Robinson Twp*, 283 Mich App 677, 696; 770 NW2d 421 (2009).

Plaintiff averred that defendant represented at mediation that the parties had a valid prenuptial agreement even though he knew that the prior prenuptial agreement had been set aside, and she believed that defendant's misrepresentation influenced the mediator's determination of a fair settlement. There is no indication that either party sought to enforce a prenuptial agreement, and nothing in the record indicates that plaintiff's consent to the settlement was procured by any representation concerning the validity of a prenuptial agreement. Again, plaintiff was not bound by any determination by the mediator. Moreover, plaintiff did not aver that she consented to the settlement because she was misled into believing that a valid prenuptial agreement existed. Accordingly, plaintiff was not entitled to have the settlement agreement set aside on the basis of fraud.

In sum, the trial court did not err by rejecting plaintiff's allegations of duress, coercion, undue influence, unconscionable advantage, and fraud. The court properly determined that there was no basis for invalidating plaintiff's consent to the settlement.

Plaintiff next argues that the trial court erred by finding that both her motion to disavow the settlement agreement and her motion to dismiss were frivolous without first conducting an evidentiary hearing. "MCR 2.114 does not provide a procedure to be followed before sanctions can be imposed." *Hicks v Ottewell*, 174 Mich App 750, 757; 436 NW2d 453 (1989). However, a party must receive some type of reasonable notice and an opportunity to be heard before the imposition of sanctions under MCR 2.114. *Id*.

Plaintiff was afforded notice that sanctions were being sought by defendant's motion for costs and attorney fees. Plaintiff answered defendant's motion and

extensively argued against defendant's motion at the motion hearing. The trial court concluded, on the basis of plaintiff's arguments and pleadings, that plaintiff's motion to disavow the settlement agreement and motion to dismiss the divorce case had frivolous motives. The trial court's determination is supported by the evidence. We are not left with a definite and firm conviction that a mistake was made. *Contel Sys Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990). As discussed, we are not persuaded that, in this particular case, it was improper for the trial court to view plaintiff's claimed fear for her life with some dubiousness. The trial court was not required to conduct a separate evidentiary hearing when it was satisfied that it was able to sufficiently decide the issue on the evidence before it. Plaintiff was afforded reasonable notice and an opportunity to be heard before sanctions were imposed. See *Hicks*, 174 Mich App at 757.

The trial court did not clearly err by finding that her motions to disavow the settlement agreement and to dismiss the divorce case had frivolous motives. *Contel*, 183 Mich App at 711. MCR 2.114(D) provides that the signature of an attorney or a party constitutes a certification by the signer that

> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

"The filing of a signed document that is not well grounded in fact and law subjects the filer to sanctions

pursuant to MCR 2.114(E)." *Guerrero v Smith*, 280 Mich App 647, 678; 761 NW2d 723 (2008).

In this case, the trial court found that plaintiff filed her motions because she had "buyer's remorse" and simply wanted "a do-over," but she had no reasonable basis to believe that the facts underlying her legal position were true. The trial court also found that plaintiff filed the motions for the purpose of delay to prevent the judgment of divorce from being entered and that the motions were disingenuous and directed at harassing defendant. The record supports these findings. Plaintiff willingly engaged in mediation, acknowledged that she heard and understood all of the terms of the settlement agreement, and stated that she agreed to all of those terms as a full and final binding settlement of the case. When defendant submitted the written settlement agreement and consent judgment of divorce for signature, plaintiff refused to do so. Instead, plaintiff moved to disavow the settlement agreement and supported her motion with an affidavit averring that defendant had caused her to fear for her life, but then moved to dismiss the case the very next day so she could reconcile with defendant. Plaintiff's inconsistent actions and recorded statements acknowledging her understanding of the settlement terms and her agreement with those terms as a final and binding settlement, as well as the method of mediation used in this case, belie her assertion that her motions were well grounded in fact.

Plaintiff also argues that the trial court erred by finding that her motions were filed for the improper purpose of causing delay. The settlement agreement indicated that the judgment of divorce was to be entered as soon as possible, likely in mid to late February, possibly as late as early March. Plaintiff argues that

because she filed her motions in mid-February, she did not cause any delay. However, the undisputed evidence showed that plaintiff had refused to sign the written settlement agreement and consent judgment of divorce when defendant presented those documents. Although plaintiff contends that she would not sign the judgment because it included some provisions that were not set out on the record at mediation, defense counsel agreed to take out the offending provisions. Plaintiff then moved to disavow the settlement agreement in its entirety and, the very next day, moved to dismiss the divorce case. The inconsistency of plaintiff's actions support the trial court's finding that she was engaging in tactical maneuvers to prevent the judgment of divorce from entering. The trial court did not clearly err by finding that plaintiff's motions were filed for the purpose of causing unnecessary delay.

Lastly, plaintiff argues that the trial court abused its discretion by awarding sanctions in the amount of $17,695. "We review the amount of an award of sanctions for an abuse of discretion." *In re Costs & Attorney Fees*, 250 Mich App 89, 104; 645 NW2d 697 (2002). An award of attorney fees as sanctions under MCR 2.114(E) must be "reasonable." *Id.*; MRPC 1.5(a). Here, the trial court issued an opinion and order in which it made detailed findings of fact and considered the factors set forth in MRPC 1.5(a). Plaintiff does not dispute the trial court's findings of fact. Rather, she argues that the trial court improperly shifted the burden of proof, improperly decided evidentiary issues by taking judicial notice of the State Bar of Michigan Economics of Law Practice Survey, and failed to recognize that it had discretion to order sanctions in an amount less than the full amount of actual attorney fees. The record does not support plaintiff's claims.

Plaintiff correctly observes that "the burden of proving the reasonableness of the requested fees rests with the party requesting them." *Smith v Khouri*, 481 Mich 519, 528-529; 751 NW2d 472 (2008). Defendant supported his motion for costs and attorney fees with an itemized list of fees resulting from plaintiff's actions, as well as documentation supporting his claims for reimbursement for out-of-pocket expenses for airfare and hotel, country club dues, and health insurance. At the hearing on defendant's motion, the trial court accommodated plaintiff by conducting an evidentiary hearing in which plaintiff's counsel was permitted to question defendant's two attorneys about their billing statements. There is no indication that the trial court placed the burden on plaintiff to show that defendant's requested fees were not reasonable, and plaintiff's assertion that defendant failed to meet his burden of proving the reasonableness of the requested fees is without merit.

Further, it was not improper for the trial court to consider the State Bar of Michigan Economics of Law Practice Survey when evaluating the reasonableness of defendant's attorney fees. "It is . . . acceptable for the court to take judicial notice of facts that can be accurately determined by sources of unquestionable reliability, for example, statistics." *Protective Nat'l Ins Co of Omaha v City of Woodhaven*, 438 Mich 154, 171; 476 NW2d 374 (1991) (CAVANAGH, C.J., dissenting), citing *Fortner v Koch*, 272 Mich 273[, 279]; 261 NW 762 (1935). Indeed, in *Smith*, 481 Mich at 530-532, our Supreme Court stated that "[t]he fees customarily charged in the locality for similar legal services can be established by . . . empirical data found in surveys" and instructed that "trial courts of this state should avail themselves of the most relevant available data" such as

that "contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan."

Finally as to this issue, the record does not support plaintiff's argument that the trial court failed to recognize that it had discretion to order sanctions in an amount less than the amount of actual attorney fees requested. Plaintiff is correct that the actual fees charged are not necessarily reasonable fees. *Zdrojewski v Murphy*, 254 Mich App 50, 72; 657 NW2d 721 (2002). The record discloses that the trial court understood that it was only permitted to award reasonable attorney fees after considering the factors in MRPC 1.5(a). Indeed, the court expressly refused to award attorney fees for various items, including time spent preparing and revising the judgment of divorce and for time spent conversing with defendant's son. Thus, it is clear that the trial court was aware of its discretion to independently determine the reasonableness of the requested fees.

In sum, we find no clear err in the trial court determination that plaintiff was liable for sanctions because her motions were interposed for frivolous reasons, and conclude that the trial court did not abuse its discretion by awarding costs and attorney fees in the amount of $17,965.

Affirmed.

K. F. KELLY, P.J., and SAWYER, J., concurred with RONAYNE KRAUSE, J.

WHEELER ESTATE v DEPARTMENT OF TREASURY

HUZELLA v DEPARTMENT OF TREASURY

WRIGHT v DEPARTMENT OF TREASURY

WHEELER v DEPARTMENT OF TREASURY

Docket Nos. 302251, 302259, 302261, and 302262. Submitted April 10, 2012, at Lansing. Decided July 31, 2012, at 9:05 a.m. Leave to appeal granted, 493 Mich 865.

The Department of Treasury issued tax bills to the estate of Thomas M. Wheeler (Docket No. 302251), Nicholas and Lisa J. Huzella (Docket No. 302259), Patrick and Michaelon Wright (Docket No. 302261), and Thomas R. and Patsy Wheeler (Docket No. 302262), asserting that additional income tax payments were due for the years 1994 and 1995. The taxpayers were shareholders of an S corporation, Electro-Wire Products, which in 1994 had acquired the business assets of a German business, Temic Telefunken Kabelsatz, GmbH. In order to accomplish the asset purchase, two partnerships were created: (1) an operating company also named Temic Telefunken Kabelsatz, GmbH (TKG), and (2) a holding company named Electro-Wire Products, GmbH (EWG), which held a 99.5 percent interest in TKG. Electro-Wire held a 99 percent interest in EWG and the remaining 0.5 percent interest in TKG. In 1994 and 1995, the taxpayers received flow-through income from Electro-Wire, including the corporation's distributive share of the partnership income from TKG. The taxpayers reported the income by treating Electro-Wire and TKG as a unitary business and combining their apportionment factors. The department asserted that the unitary business principle did not apply to individuals and that the taxpayers were required to apply Electro-Wire's apportionment factors to its income alone. The taxpayers sought an informal conference before a hearing referee, who concluded that the unitary business principle could be applied to individual taxpayers. The department rejected the hearing referee's recommendation in its ultimate decision and order of determination, upholding the tax assessments. The taxpayers filed petitions for review in the Tax Tribunal, which consolidated the cases. The Tax Tribunal granted the taxpayers' motion for summary disposition

and denied the department's motion for summary disposition, determining that the unitary business principle applied and that Electro-Wire and TKG were a unitary business and entitled to combine their apportionment factors. The department appealed each case separately. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Under the unitary business principle, for a business or individual to exercise multistate apportionment of income, there must be some sharing or exchange of value not capable of precise identification or measurement—beyond the mere flow of funds arising out of a passive investment or a distinct business operation—that renders formula apportionment a reasonable method of taxation. Michigan law does not allow separate entities to be treated as a unitary business in the absence of some common ownership at the entity level, and being owned by the same individual taxpayers is insufficient to trigger this relationship requirement. In these cases, Electro-Wire and TKG were not separate and legally distinct business entities, but stood in a parent/subsidiary relationship. Notably, the income to the taxpayers flowed through one source, Electro-Wire. Under the circumstances, application of multistate apportionment was appropriate.

2. Under the Income Tax Act, MCL 206.1 *et seq*., specifically MCL 206.103, any taxpayer having income from a business activity that is taxable both within Michigan and within any foreign country is required to apportion his or her net income. For the years in issue, the language used to define the statutory apportionment factors made clear that there was no specific prohibition on apportioning business income through the addition of international apportionment factors—provided that the international business was unitary with the Michigan business. And, as a constitutional matter, the United States Supreme Court has held that international apportionment factors may be included in a state's apportionment calculations.

3. In determining whether two businesses are unitary for purposes of the Income Tax Act, a court must consider (1) economic realities, (2) functional integration, (3) centralized management, (4) economies of scale, and (5) substantial mutual interdependence. Consideration of economic realities addresses whether the regularly conducted activities of the businesses in question are related. In these cases, both Electro-Wire and TKG were engaged in the same business. There is no requirement that the unity of businesses be the result of collaborative development. Consideration of functional integration concerns the extent to

which business functions are blended to promote a unitary relationship. In these cases, when it was acquired, TKG was without certain critical support services, and Electro-Wire began providing those services. Thus, the businesses were sufficiently integrated. When considering whether management of the businesses was centralized, it was sufficient that TKG was subject to centralized management decisions directed by Electro-Wire's managers. Complete management was not required. Evidence of economic benefits that resulted from the combination of Electro-Wire and TKG was sufficient to establish the presence of economies of scale. Evidence regarding bulk purchasing or improved resource allocation was not necessary to demonstrate the presence of economies of scale. With regard to substantial mutual interdependence, the taxpayers presented evidence that acquisition of TKG was essential for Electro-Wire to retain a critical client. In light of the evidence concerning these factors, the Tax Tribunal's decision that Electro-Wire and TKG were a unitary business was supported by unrebutted, competent, material, and substantial evidence on the whole record.

4. Under MCL 205.23(3), if any part of a tax deficiency is the result of negligence, a penalty of $10 or 10 percent of the deficiency, whichever is greater, plus interest is added to the deficiency. However, the department must waive this penalty if the taxpayer demonstrates that the tax deficiency resulted from reasonable cause. Reasonable cause is generally deemed to exist when there is an honest difference of opinion with regard to the effect or application of the law. In these cases, the taxpayers calculated their tax liabilities in reliance on appellate court decisions. The cases formed a substantial legal foundation on which the taxpayers could base their opinions regarding the application of the Income Tax Act to their individual returns, and the taxpayers thus exercised reasonable care in completing their tax returns. Under the circumstances, the Tax Tribunal did not err by declining to impose the penalty.

Affirmed.

1. TAXATION — INCOME TAX — MULTISTATE BUSINESSES — APPORTIONMENT — UNITARY BUSINESS PRINCIPLE.

Under the unitary business principle, for a business or individual to exercise multistate apportionment of income, there must be some sharing or exchange of value not capable of precise identification or measurement—beyond the mere flow of funds arising out of a passive investment or a distinct business operation—that renders formula apportionment a reasonable method of taxation; Michigan

law does not allow separate entities to be treated as a unitary business in the absence of some common ownership at the entity level, and being owned by the same individual taxpayers is insufficient to trigger this relationship requirement.

2. TAXATION — INCOME TAX — INTERNATIONAL BUSINESSES — APPORTIONMENT.

Any taxpayer having income from a business activity that is taxable both within Michigan and within any foreign country is required to apportion his or her net income; when the language used to define the applicable statutory apportionment factors makes clear that there is no specific prohibition on apportioning business income through the addition of international apportionment factors, the Income Tax Act does not exclude foreign entities from consideration under the unitary business principle for apportionment purposes (MCL 206.20, MCL 206.103, MCL 206.115, and MCL 206.121).

3. TAXATION — INCOME TAX — MULTISTATE BUSINESSES — APPORTIONMENT — UNITARY BUSINESS PRINCIPLE — CONSIDERATIONS.

In determining whether two businesses are unitary for purposes of the Income Tax Act, a court must consider (1) economic realities, (2) functional integration, (3) centralized management, (4) economies of scale, and (5) substantial mutual interdependence; consideration of economic realities addresses whether the regularly conducted activities of the businesses in question are related—there is no requirement, however, that the unity of businesses be the result of collaborative development; consideration of functional integration concerns the extent to which business functions are blended to promote a unitary relationship; consideration of centralized management requires consideration of whether management of the businesses was centralized across the potentially unitary business—complete management, however, is not required; consideration of economies of scale examines the presence of economies of scale—evidence regarding bulk purchasing or improved resource allocation, however, is not necessary to demonstrate the presence of economies of scale; consideration of substantial mutual interdependence examines whether such interdependence exists (MCL 206.1 *et seq*.)

4. TAXATION — INCOME TAX — DEFICIENCIES — PENALTIES — WAIVER — REASONABLE CAUSE.

Under MCL 205.23(3), if any part of a tax deficiency is the result of negligence, a penalty of $10 or 10 percent of the deficiency, whichever is greater, plus interest is added to the deficiency; however, the Department of Treasury must waive this penalty if

> the taxpayer demonstrates that the tax deficiency resulted from reasonable cause; reasonable cause is generally deemed to exist when there is an honest difference of opinion with regard to the effect or application of law.

Honigman Miller Schwartz and Cohn LLP (by *June Summers Haas* and *Eric J. Eggan*) for petitioners.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Kevin T. Smith*, Assistant Attorney General, for respondent.

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM. Respondent, the Department of Treasury, appeals an order of the Michigan Tax Tribunal that granted petitioners' motion for summary disposition and denied respondent's motion for summary disposition. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEEDINGS

Petitioners were shareholders of an S corporation called Electro-Wire Products that makes electrical systems for Ford Motor Company. Ford wanted Electro-Wire to establish a worldwide presence, so in 1994 Electro-Wire acquired all the business assets of a German business, Temic Telefunken Kabelsatz, GmbH,[1] which was also engaged in the business of manufacturing and assembling electrical distribution systems. To accomplish the asset purchase, two general partnerships were created: (1) an operating company also named Temic Telefunken Kabelsatz, GmbH (TKG),

[1] GmbH is the standard abbreviation for "Gesellschaft mit beschränkter Haftung," a German corporate form.

which held all the purchased assets, and (2) a holding company named Electro-Wire Products, GmbH (EWG), which held a 99.5 percent partnership interest in TKG. Electro-Wire held a 99 percent partnership interest in EWG, as well as the remaining 0.5 percent partnership interest in TKG. As an S corporation and two general partnerships, Electro-Wire, EWG, and TKG were flow-through entities for tax purposes.

In 1994 and 1995, petitioners received flow-through income from Electro-Wire, which included Electro-Wire's distributive share of the partnership income from TKG. Petitioners reported this income by treating Electro-Wire and TKG as a unitary business and combining their apportionment factors. Respondent audited petitioners for those years and issued petitioners a tax bill. Respondent asserted that the unitary business principle (UBP) did not apply to individuals under the Income Tax Act (ITA), MCL 206.1 *et seq.*, and that petitioners were required to apply Electro-Wire's apportionment factors to Electro-Wire's income alone and independently of TKG. A hearing referee found that the UBP applied to individuals like petitioners and that Electro-Wire and TKG were a unitary business entitled to combining apportionment factors for tax purposes, but respondent disagreed. Petitioners appealed to the Tax Tribunal and, as noted, the tribunal ruled in favor of petitioners.

II. STANDARDS OF REVIEW

Absent an allegation of fraud, this Court reviews a Tax Tribunal decision for misapplication of the law or adoption of a wrong legal principle. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010). We uphold the Tax Tribunal's findings of fact if they are supported by competent, material, and sub-

stantial evidence in the record as a whole. *Canterbury Health Care, Inc v Dep't of Treasury*, 220 Mich App 23, 28; 558 NW2d 444 (1996). We review de novo the grant or denial of a motion for summary disposition. *Briggs Tax Serv*, 485 Mich at 75.

III. ANALYSIS

A. APPLICATION OF THE UBP

Respondent argues that the UBP does not permit individuals to combine the income from multiple entities for apportionment purposes.

Under the ITA, if a taxpayer's income-producing activities are confined solely to Michigan, then the taxpayer's entire income must be allocated to Michigan. MCL 206.102. If a taxpayer has income from activities that are taxable both inside and outside of Michigan, that income is allocated pursuant to MCL 206.115. MCL 206.103. In order to distinguish between multistate businesses that can allocate their income to specific geographic areas and multistate businesses that cannot, the United States Supreme Court has recognized the value of the UBP. *Allied-Signal, Inc v Div of Taxation Dir*, 504 US 768, 778; 112 S Ct 2251; 119 L Ed 2d 533 (1992). Under the UBP, for a business or individual to exercise multistate apportionment, there must "be some sharing or exchange of value not capable of precise identification or measurement—beyond the mere flow of funds arising out of a passive investment or a distinct business operation—which renders formula apportionment a reasonable method of taxation." *Container Corp of America v Franchise Tax Bd*, 463 US 159, 166; 103 S Ct 2933, 77 L Ed 2d 545 (1983). This Court has also recognized the functionality of the UBP, applying it in a number of previous appellate decisions,

including *Holloway Sand & Gravel Co, Inc v Dep't of Treasury*, 152 Mich App 823; 393 NW2d 921 (1986), *Jaffe v Dep't of Treasury*, 172 Mich App 116; 431 NW2d 416 (1988), and the cases discussed next.

This Court has recently issued two published opinions addressing the application of the UBP to business income derived from multiple entities: *Preston v Dep't of Treasury*, 292 Mich App 728; 815 NW2d 781 (2011), and *Malpass v Dep't of Treasury*, 295 Mich App 263; 815 NW2d 804 (2012).

In *Preston*, a taxpayer was the sole partner in a Tennessee limited partnership, Life Care Affiliates II (LCA II), that owned a 99 percent share in 22 lower-level limited partnerships. *Preston*, 292 Mich App at 730. Those lower-level partnerships in turn owned 27 nursing homes nationwide. *Id*. One of those lower-level partnerships owned a pair of nursing homes that operated in Michigan, while the remaining 21 lower-level partnerships had no Michigan business activities. *Id*. at 730-731.

All 22 partnerships distributed gains and losses to LCA II, which in turn distributed the combined income to the taxpayer. *Id*. When reporting his Michigan income, the taxpayer offset the gains produced by the partnership operating his Michigan-based nursing homes with losses suffered by other partnerships. *Id*. at 731. Upon a challenge from respondent, this Court concluded that LCA II operated the lower-level partnerships as a unitary business and that the taxpayer was entitled to apportion the income he received from LCA II. *Id*. at 733-737.

In *Malpass*, however, this Court reached a different result under different facts. The taxpayers owned two separate S corporations, one operating in Michigan and one operating in Oklahoma. *Malpass*, 295 Mich App at

265-266. The taxpayers initially filed their individual income tax returns by treating the S corporations as separate, nonunitary businesses, but later filed amended returns seeking to treat them as a unitary business. *Id*. at 266. Upon a challenge by respondent, this Court, while acknowledging that the S corporations in question had many characteristics of a unitary business, rejected the taxpayers' application of the UBP because the S corporations were "separate and legally distinct business entities, and nothing in the ITA allows for combined-entity reporting." *Id*. at 270.

Malpass also distinguished its facts from those in *Preston*, concluding that, although each of the 22 partnerships was a separate entity, all were joined by LCA II, which owned 99 percent of each of the 22 lower-level partnerships. *Malpass*, 295 Mich App at 274-275. By contrast, the taxpayers in *Malpass* received business income from two separate businesses. *Id*. at 275. Given this distinction, it appears that Michigan law does not allow separate entities to be treated as a unitary business in the absence of some common ownership at the entity level and that being owned by the same individual taxpayers is insufficient to trigger this relationship requirement.

We hold that the facts in the cases at issue here are more analogous to those of *Preston* than *Malpass*. TKG is 99 percent owned by EWG, which is in turn 99.5 percent owned by Electro-Wire. Electro-Wire and TKG are not "separate and legally distinct business entities," but stand in what amounts to a parent/subsidiary relationship. Like *Preston*, the income to petitioners flowed through one source, in this case Electro-Wire, and not through two separate sources as in *Malpass*. Therefore, Electro-Wire and TKG should be permitted to avail themselves of multistate apportionment under the ITA.

Accordingly, because the UBP permits individuals to combine the income of multiple entities that are legally associated and unitary businesses for apportionment purposes, the Tax Tribunal did not err by awarding summary disposition to petitioners.

B. THE UBP AND FOREIGN ENTITIES

We also disagree with respondent that the ITA excludes foreign entities from consideration under the UBP for apportionment purposes.

The goal of statutory interpretation is to determine the intent of the Legislature. *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 8; 818 NW2d 337 (2011). "The starting place for the search for intent is the language used in the statute." *Bio-Magnetic Resonance, Inc v Dep't of Pub Health*, 234 Mich App 225, 229; 593 NW2d 641 (1999). Although this Court affords respectful consideration to the construction given a statute by an agency and ought not overrule an agency's construction, if persuasive, without cogent reasons, the agency's interpretation is not binding on this Court and cannot conflict with the plain meaning of the statute. *In re Rovas Complaint Against SBC Mich*, 482 Mich 90, 103, 108-109; 754 NW2d 259 (2008). Nonetheless, when tax statutes are construed, any ambiguities are resolved in favor of the taxpayer. *Int'l Business Machines v Dep't of Treasury*, 220 Mich App 83, 86; 558 NW2d 456 (1996).

Pursuant to MCL 206.103, "[a]ny taxpayer having income from business activity which is taxable both within and without this state . . . shall allocate and apportion his net income as provided in this part." "State" is defined under MCL 206.20 as "any state of the United States, the District of Columbia, the Com-

monwealth of Puerto Rico, any territory or possession of the United States, and *any foreign country*, or political subdivision, thereof." (Emphasis added.) As such, any taxpayer having income from a business activity that is taxable both within Michigan and within any foreign country is required to apportion his or her net income.

This apportionment is carried out in accordance with MCL 206.115, which, before January 1, 2012, required apportionment of business income by "multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3." During the years at issue, "property factor" was defined as "the average value of the taxpayer's real and tangible personal property owned or rented and used in this state" over "the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period." Former MCL 206.116, repealed by 2011 PA 38. "Payroll factor" was defined as "the total amount paid in this state during the tax period by the taxpayer for compensation" over "the total compensation paid everywhere during the tax period." Former MCL 206.119, repealed by 2011 PA 38. "Sales factor" was, and is, defined as "the total sales of the taxpayer in this state during the tax period" over "the total sales of the taxpayer everywhere during the tax period." MCL 206.121. The Legislature's use of the words "all" and "everywhere" in these definitions makes it clear that there is no specific prohibition on apportioning business income through the addition of international apportionment factors, provided that the international business is unitary with the Michigan business.

Moreover, the United States Supreme Court has held that, as a constitutional matter, international apportionment factors may be included in a state's apportionment calculations. *Container Corp*, 463 US 159. Respondent contends that Michigan is not required to tax to the maximum constitutional limit and that it is for the Legislature to instruct, through specific statutory provisions, whether international apportionment factors should be included under the ITA. However, this argument ignores the fact that the plain language of the ITA requires unitary, international businesses to apportion their income, and the plain language of the ITA in effect during the years at issue required unitary, international businesses to include international apportionment factors in the calculation of property, payroll, and sales factors. "If the statute's language is plain and unambiguous, we assume the Legislature intended its plain meaning; therefore, we enforce the statute as written and follow the plain meaning of the statutory language." *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004).

Therefore, because the ITA does not exclude foreign entities from consideration under the UBP, the Tax Tribunal did not err by granting summary disposition to petitioners.

C. ELECTRO-WIRE AND TKG AS A UNITARY BUSINESS

Respondent's argument that the Tax Tribunal erred by finding Electro-Wire and TKG to be a unitary business also lacks merit.

This Court utilizes a five-factor test to assess whether two businesses are unitary. This Court outlined these factors in *Holloway*, 152 Mich App at 831, as follows: "(1) economic realities; (2) functional integration; (3) centralized management; (4) economies of

scale, and (5) substantial mutual interdependence." Petitioners submitted unrebutted evidence to the Tax Tribunal to establish each of these five criteria, and the Tax Tribunal concluded that petitioners had established at least four, and possibly all five, of the relevant factors.

The first factor, economic realities, addresses whether the regularly conducted activities of the businesses in question are related. *Holloway*, 152 Mich App at 832. The record shows that the underlying businesses of Electro-Wire and TKG were identical because both were engaged in the manufacturing and assembling of electrical distribution systems. Respondent claims that this is immaterial because the two businesses were engaged in the same underlying business before Electro-Wire purchased TKG. However, there is no requirement under *Holloway* or related cases that potentially unitary businesses develop the same underlying activities collaboratively; the only requirement is that the underlying businesses be related to each other.

The second factor, functional integration, concerns the extent to which business functions are blended to promote a unitary relationship. Petitioners presented evidence that, before it was acquired by Electro-Wire, TKG was part of the Daimler Group. Once Electro-Wire purchased TKG, however, this relationship was severed, leaving TKG without critical support services, which were assumed by Electro-Wire. These services included direct management of TKG's business activities and support for component engineering, manufacturing and industrial engineering, cost estimating, business development, finance, and executive administration. Respondents presented no rebuttal evidence, but set forth on appeal a list identifying ways in which Electro-Wire and

TKG were not integrated. However, this belated argument is not persuasive because there is no requirement that businesses be 100 percent integrated in order to classify them as unitary.

The third factor examines the extent to which management was centralized across the potentially unitary business. Petitioners submitted unrebutted evidence that TKG's overall management decisions were centralized and directed by Electro-Wire managers in North America and that Electro-Wire hired and fired all TKG officers and managers. Again, respondent presented no rebuttal evidence, but alleges that Electro-Wire did not engage in day-to-day management of TKG. Again, however, the only requirement under *Holloway* is centralized management, not complete management.

The fourth factor looks for the presence of economies of scale. Petitioners presented unrebutted evidence of economic benefits generated by the combination of Electro-Wire and TKG, such as an expanded customer base, sharing of unique and proprietary processes, and improved financing terms. Respondent presented no evidence to challenge this, but argues that petitioners failed to show profits through bulk purchasing or improved allocation of resources. These are typically considered to be common economies of scale, but respondent does not explain how cheaper component parts, an expanded customer base, increasing economic diversification, and improved financing conditions are not also benefits derived from economies of scale.

The fifth and final factor considers whether substantial mutual interdependence exists. Petitioners submitted unrebutted evidence that acquiring TKG was essential for Electro-Wire to remain a supplier for Ford and that remaining a supplier for Ford was essential to Electro-Wire's survival. The Tax Tribunal found that

Electro-Wire was dependent on TKG, but was unable to conclude whether or not TKG was similarly dependent on Electro-Wire, and thus resolved this factor partially in favor of petitioners.

On the basis of these factors, the Tax Tribunal's finding that Electro-Wire and TKG were a unitary business was supported by unrebutted, competent, material, and substantial evidence on the whole record.

D. TEN PERCENT PENALTY

We reject respondent's argument that a 10 percent penalty for negligent failure to pay taxes should be imposed on petitioners.

Pursuant to MCL 205.23(3), if any part of a tax deficiency is the result of negligence, a penalty of $10 or 10 percent of the deficiency, whichever is greater, plus interest is added to the deficiency. MCL 205.23(3) also provides that respondent shall waive this negligence penalty if a taxpayer demonstrates that the tax deficiency resulted from reasonable cause. Reasonable cause is generally deemed to exist when there is an honest difference of opinion with regard to the effect or application of the law. *JW Hobbs Corp v Dep't of Treasury*, 268 Mich App 38, 54; 706 NW2d 460 (2005).

In these cases, petitioners based their tax returns on this Court's decisions in *Holloway* and *Jaffe*, as well as numerous United States Supreme Court decisions. These cases formed a substantial legal foundation on which petitioners could base their opinions regarding the application of the ITA to their individual returns. Moreover, the fact that petitioners have succeeded on the merits at their informal conference, before the Tax Tribunal, and in this Court, underscores the reasonableness of their legal position.

Therefore, because petitioners exercised reasonable care when filing their tax returns, the Tax Tribunal did not err by declining to impose a 10 percent penalty for negligent failure to pay taxes.

Affirmed.

HOEKSTRA, P.J., and SAWYER and SAAD, JJ., concurred.

SELDON v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION

Docket No. 295748. Submitted January 4, 2012, at Detroit. Decided June 26, 2012. Approved for publication July 31, 2012, at 9:10 a.m. Leave to appeal denied, 493 Mich 905.

Ruby Seldon brought an action in the Wayne Circuit Court against Suburban Mobility Authority for Regional Transportation (SMART) and Queen Perry, an employee of SMART, seeking damages for injuries sustained while a passenger on a SMART bus when Seldon, a wheelchair user, was ejected from her wheelchair as Perry applied the brakes of the SMART bus she was driving in order to stop at a yellow traffic signal light. Seldon alleged claims of negligence and gross negligence against defendants. The court, Kathleen Macdonald, J., denied SMART's motion for summary disposition with regard to its claims of governmental immunity and granted summary disposition for Perry with regard to the gross negligence claim. SMART appealed and Seldon cross-appealed.

The Court of Appeals *held*:

1. SMART had no duty to advise Seldon of the availability of a shoulder restraint or to secure her in her wheelchair. Regulations promulgated by the United States Department of Transportation to effectuate the purpose of the Americans with Disabilities Act, 42 USC 12101 *et seq.*, prohibit a transit operator from requiring passengers in wheelchairs to use seat belts or shoulder restraints unless the operator requires the same of all passengers. Because SMART buses are not equipped with such devices for all passengers, SMART could not require Seldon to use a shoulder restraint. To require operators to inform passengers in wheelchairs of the availability of seat belts or shoulder restraints, in light of the unavailability of such devises for passengers not using wheelchairs, would impose a different duty on operators depending on whether a passenger is able-bodied or wheelchair bound and would be contrary to the tenet that disabled passengers are to be treated the same as able-bodied passengers. Federal regulations require that an operator's drivers or other personnel provide assistance with lifts, ramps, and devices to secure a wheelchair, but do not require operators to advise a passenger in a wheelchair of the

availability of a seat belt or shoulder restraint. Federal regulations further provide that transit operators may not place personal restraints on passengers in wheelchairs absent some indication by the passenger that he or she wishes to wear one. The trial court erred by concluding that SMART owed a duty to advise Seldon of the availability of a shoulder restraint, but properly concluded that SMART had no duty to secure Seldon by using a personal restraint such as a seat belt or shoulder harness.

2. Although the loading and unloading of passengers is an activity within the "operation" of a motor vehicle for purposes of the motor vehicle exception to governmental immunity provided in MCL 691.1405, the failure to inform Seldon that a shoulder restraint was available, without more, did not constitute the "operation" of the motor vehicle. The motor vehicle exception was inapplicable. The trial court erred by denying the part of SMART's motion for summary disposition that was based on the defense of governmental immunity.

3. Regardless of the specific basis of a trial court's ruling on a motion for summary disposition, whenever the effect is to deny a defendant's claim of governmental immunity, the ruling is reviewable under MCR 7.203(A) and MCR 7.202(6)(a)(v). The Court of Appeals had jurisdiction to review, pursuant to MCR 7.203(A) and MCR 7.202(6)(a)(v), the trial court's determination, with regard to SMART's motion for summary disposition, that plaintiff established a question of fact regarding whether the sudden stopping of the bus by Perry was negligence or, instead, was within the normal incidents of travel, because the effect of the ruling was to deny SMART's claim of governmental immunity.

4. The trial court erroneously determined that Seldon presented evidence establishing a justiciable question of fact regarding whether Perry operated the bus negligently. Absent evidence of other negligence pertaining to the operation of a bus, a plaintiff bus passenger may not recover for injuries sustained when the bus suddenly stopped because such stops are normal incidents of travel. There was no evidence presented that Perry operated the bus negligently by traveling within the speed limit while the traffic control signal was green.

5. Perry's actions did not constitute "the proximate cause" of Seldon's injuries as required by MCL 691.1407(2)(c). The application of the brakes was the one most immediate, efficient, and direct cause preceding Seldon's injuries and Perry's failure to secure Seldon with a personal restraint was not the cause of Seldon's injuries. The record does not indicate that Perry acted

with gross negligence when she applied the brakes. The trial court properly granted summary disposition for Perry with regard to the gross negligence claim.

Affirmed in part and reversed in part.

STEPHENS, J., concurring in part and dissenting in part, agreed with the determination of the majority that the trial court properly granted summary disposition with regard to the claim of gross negligence. Judge STEPHENS disagreed that the trial court erred by only granting in part SMART's motion for summary disposition because she believes that the trial court properly determined that defendants owed Seldon a duty to advise her of the availability of a seat belt, that there is a genuine issue of material fact relating to whether a sudden stop caused Seldon's injuries, and that the motor vehicle exception to governmental immunity, MCL 691.1405, applies. Therefore, the entire order of the trial court should be affirmed. The federal prohibition precluding defendants from requiring Seldon to utilize a seat belt to restrain her in her wheelchair did not eliminate the duty to inform Seldon that a shoulder restraint was available for wheelchair users so that she could decide whether she wished to use it. The federal regulations do not prohibit, restrict, or comment in any specific way about a transportation provider's responsibility to advise passengers in wheelchairs of available seat belts. The duty of public transportation authority's personnel to ensure that a passenger with a disability is able to take advantage of the accessibility and safety features on vehicles arguably includes apprising the passenger of the existence of the accessibility features, because a passenger cannot take advantage of a feature of which he or she is unaware. The purported negligence of SMART, through Perry, involving the failure to mention the availability of a seat belt capable of strapping Seldon in her wheelchair, comprises a component of the loading of passengers in wheelchairs, an action within the operation of a bus, that satisfies the exception to governmental immunity set forth in MCL 691.1405. An inference of negligence reasonably arises from the fact that Perry's braking of the bus at a traffic signal light was sudden enough to dislodge Seldon from her wheelchair with enough force to break both her ankles. The jury should be permitted to decide whether Perry committed a negligent act that caused Seldon's injuries. Although defendants had a duty to inform Seldon of the availability of a shoulder restraint, defendants did not have duty to actually apply the restraint absent a request by Seldon. The record demonstrates insufficient evidence to maintain an action for gross negligence against Perry.

1. PUBLIC TRANSPORTATION — PASSENGERS IN WHEELCHAIRS — SAFETY DEVICES — REQUIRED USE OF SAFETY DEVICES.

Regulations promulgated by the United States Department of Transportation to effectuate the purpose of the Americans with Disabilities Act prohibit a transit operator that provides transportation services to the general public from requiring passengers in wheelchairs to use seat belts or shoulder restraints unless the operator requires the same of all passengers; requiring operators to inform passengers in wheelchairs of the availability of seat belts or shoulder restraints when such devices are unavailable to passengers not in wheelchairs is contrary to the tenet that disabled passengers are to be treated the same as able-bodied passengers (42 USC 12101 *et seq*.; 49 CFR 37.1; 49 CFR 37.5).

2. PUBLIC TRANSPORTATION — PASSENGERS IN WHEELCHAIRS — SAFETY DEVICES.

Although federal regulations state that a public transportation entity's personnel have an obligation to ensure that a passenger with a disability is able to take advantage of the accessibility and safety features on a vehicle, the obligation requires only that the personnel provide assistance with lifts, ramps, and devices to secure a wheelchair and does not require such personnel to advise passengers in wheelchairs that seat belts or shoulder restraints are available (49 CFR, part 37, appendix D, subpart G, § 37.165).

3. PUBLIC TRANSPORTATION — GOVERNMENTAL IMMUNITY — ACTIVITIES WITHIN THE OPERATION OF A MOTOR VEHICLE.

The loading and unloading of passengers is an activity within the operation of a motor vehicle for purposes of the motor vehicle exception to governmental immunity; the failure to inform a passenger in a wheelchair that a shoulder restraint is available does not, without more, constitute the operation of the motor vehicle (MCL 691.1405).

4. APPEAL — MOTIONS AND ORDERS — GOVERNMENTAL IMMUNITY — SUMMARY DISPOSITION.

Regardless of the specific basis of a trial court's ruling on a motion for summary disposition, whenever the effect is to deny a defendant's claim of governmental immunity the decision is, in fact, an order denying governmental immunity that is reviewable under MCR 7.202(6)(a)(v) and MCR 7.203(A).

5. PUBLIC TRANSPORTATION — NEGLIGENCE — SUDDEN STOPPING OF BUS.

A plaintiff bus passenger may not recover for injuries sustained when the bus suddenly stopped, absent evidence of other negligence pertaining to the operation of the bus, because such stops are normal incidents of travel.

6. PUBLIC TRANSPORTATION — PASSENGERS WITH DISABILITIES — PASSENGER SECUREMENT SYSTEMS.

Federal regulations provide that the personnel of public transit operators shall assist individuals with disabilities with the use of securement systems when necessary or upon request but may not place personal restraints on passengers in wheelchairs absent an indication by such a passenger that he or she wishes to use one (49 CFR 37.165[f]).

7. GOVERNMENTAL IMMUNITY — GROSS NEGLIGENCE — PROXIMATE CAUSE — WORDS AND PHRASES.

The phrase "the proximate cause" in MCL 691.1407(2)(c) requires that the governmental employee's grossly negligent conduct be the one most immediate, efficient, and direct cause preceding an injury.

Moss & Colella, P.C. (by *A. Vince Colella* and *Laura R. Dierwa*), for plaintiff.

Vandeveer Garzia, P.C. (by *Christian E. Hildebrandt* and *John J. Lynch*), for defendant.

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

DONOFRIO, P.J. Defendant Suburban Mobility Authority for Regional Transportation (SMART) appeals as of right the trial court's order denying in part its motion for summary disposition with respect to its claims of governmental immunity. Plaintiff cross-appeals the same order to the extent that the court granted summary disposition for defendant Queen Perry and partially granted summary disposition for SMART. We hold that because SMART had no duty to secure plaintiff in her wheelchair or inform her of the availability of a shoulder restraint, the failure to inform plaintiff did not constitute the operation of a motor vehicle under MCL 691.1405, which states the motor vehicle exception to governmental immunity. Because plaintiff failed to es-

tablish a justiciable question of fact regarding whether Perry operated the bus negligently or acted with gross negligence, we affirm the grant of summary disposition in favor of Perry and the partial summary disposition in favor of SMART and reverse the partial denial of SMART's motion for summary disposition.

Plaintiff instituted this action because of injuries that she sustained in January 2008 while riding on a SMART bus driven by defendant Perry. Plaintiff was ejected from her wheelchair and sustained bilateral ankle fractures when Perry applied the brakes to stop at a yellow traffic signal light. Plaintiff alleged claims of negligence and gross negligence against SMART and Perry. The trial court denied summary disposition for SMART with regard to its claims of governmental immunity and granted summary disposition for Perry on plaintiff's gross negligence claim. SMART now appeals and plaintiff cross-appeals the trial court's decisions.

I. DUTY TO ADVISE

SMART first argues that the trial court erred by denying its motion for summary disposition on the basis that it owed plaintiff a duty to advise her of the availability of a shoulder restraint. We review de novo a trial court's decision on a motion for summary disposition. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). Summary disposition under MCR 2.116(C)(7) is appropriate when a claim is barred by immunity granted by law. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). In reviewing a ruling pursuant to subrule (C)(7), "[w]e consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents spe-

cifically contradict them." *Fane*, 465 Mich at 74. The applicability of governmental immunity is a question of law that is also reviewed de novo. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004).

In order to establish a prima facie negligence claim, a plaintiff must prove four elements: (1) duty, (2) breach of the duty, (3) causation, and (4) damages. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). "The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff." *Id*. Whether a duty exists is a question of law for the court to decide. *Anderson v Wiegand*, 223 Mich App 549, 554; 567 NW2d 452 (1997).

SMART had no legal duty to advise plaintiff of the availability of a shoulder restraint. Regulations promulgated by the United States Department of Transportation (DOT) to effectuate the purpose of the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, prohibit a transit operator from requiring passengers in wheelchairs to use seat belts or shoulder restraints unless the operator requires the same of all passengers. 49 CFR 37.1; 49 CFR 37.5. Because SMART buses are not equipped with such devices for all passengers, SMART could not have legally required plaintiff to use a shoulder restraint. Requiring operators to inform passengers in wheelchairs of the availability of seat belts or shoulder restraints, in light of the unavailability of such devices for passengers not using wheelchairs, would impose a different duty on operators depending on whether a passenger is able-bodied or wheelchair-bound and runs contrary to the tenet that disabled passengers are to be treated the same as able-bodied passengers.

Further, while appendix D, subpart G, § 37.165 to 49 CFR, part 37 states that an "entity's personnel have an

obligation to ensure that a passenger with a disability is able to take advantage of the accessibility and safety features" on a vehicle, this obligation requires only that drivers or other personnel provide assistance with lifts, ramps, and devices to secure a wheelchair. No regulation requires a transit operator to advise a passenger in a wheelchair of the availability of a seat belt or shoulder restraint. Likewise, SMART's internal policy did not require defendant Perry, the bus driver, to advise plaintiff that a shoulder restraint was available. Accordingly, SMART owed no duty to advise plaintiff of the availability of a shoulder restraint, and the trial court erred by concluding otherwise.[1]

II. OPERATION OF A MOTOR VEHICLE

SMART next argues that even if it owed plaintiff a duty to inform her that a shoulder restraint was available, the failure to do so did not constitute the "operation" of a motor vehicle within the meaning of MCL 691.1405, which states the motor vehicle exception to governmental immunity. MCL 691.1405 provides that

[1] We know from plaintiff's deposition that she had previously worked as a bus driver for the Southeastern Michigan Transportation Authority (SEMTA), now known as SMART, and was familiar with passengers in wheelchairs, wheelchair restraints, and shoulder restraints. Although she had not operated the specific kind of bus involved in this accident, a bus designed with a lift and used to transport disabled persons, she testified that she had ridden this type of bus previously and had neither used nor been advised of the presence of a shoulder restraint and had not requested to use one. Plaintiff further testified that her wheelchair was equipped with a lap belt, but it did not reach around her. Similarly, Perry testified that the lap belt did not reach around plaintiff and that she did not believe that the shoulder restraint would have fit around plaintiff either. Moreover, the record shows that when emergency services personnel arrived, plaintiff was lifted back into her wheelchair and SMART transported her to the same hospital that had been her original destination. Notably, the emergency services personnel used their own restraint rather than the bus's shoulder restraint to secure her in her wheelchair.

"[g]overnmental agencies shall be liable for bodily injury . . . resulting from the negligent operation . . . of a motor vehicle[.]" In *Chandler v Muskegon Co*, 467 Mich 315, 321; 652 NW2d 224 (2002), our Supreme Court interpreted the phrase "operation of a motor vehicle" to "encompass[] activities that are directly associated with the driving of a motor vehicle." In *Martin v Rapid Inter-Urban Partnership*, 480 Mich 936 (2007), the Court held, in an order, that "[t]he loading and unloading of passengers is an action within the 'operation' of a shuttle bus." In that case, the plaintiff was injured when she slipped and fell on the bus steps as she was attempting to get out of the vehicle. *Id.*

Here, even if SMART owed plaintiff a duty to inform her of the availability of a shoulder restraint, the failure to so advise her did not implicate MCL 691.1405. Although the loading and unloading of passengers is an activity within the operation of a motor vehicle, the failure to inform plaintiff that a shoulder restraint was available, without more, did not constitute the "operation" of the motor vehicle. Notably, plaintiff's wheelchair was loaded onto the bus and secured without incident, and plaintiff was not injured during the loading or unloading process. Thus, the motor vehicle exception to governmental immunity was inapplicable, and the trial court erred by denying SMART's motion for summary disposition based on governmental immunity.

III. SUDDEN STOPPING

SMART next argues that even if the motor vehicle exception to governmental immunity was applicable, the trial court erred by determining that plaintiff established a question of fact regarding whether Perry's sudden stopping of the bus was negligence or was part

of the normal incidents of travel. Before addressing the merits of this argument, we first address plaintiff's claim that this Court lacks jurisdiction to decide this issue.

Plaintiff argues that this issue, pertaining to whether plaintiff has presented sufficient evidence to establish a jury question regarding negligence, is not appealable as of right pursuant to MCR 7.203(A) and MCR 7.202(6)(a)(v). Those provisions state that this Court has jurisdiction to decide an appeal of right from an order denying governmental immunity under MCR 2.116(C)(7) or "denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity," but the appeal is limited to "the portion of the order with respect to which there is an appeal of right." MCR 7.203(A)(1). In *Walsh v Taylor*, 263 Mich App 618, 625; 689 NW2d 506 (2004), this Court interpreted the provisions and opined that "regardless of the specific basis of the trial court's ruling on a motion for summary disposition, whenever the effect is to deny a defendant's claim of immunity, the trial court's decision is, in fact, 'an order denying governmental immunity,' " and is reviewable under MCR 7.203(A) and MCR 7.202(6)(a)(v). Here, the trial court determined that plaintiff established a question of fact regarding whether the sudden stopping of the bus was negligence or was within the normal incidents of travel. Pursuant to MCL 691.1405, SMART was liable only if plaintiff's injuries resulted from "the negligent operation" of a motor vehicle. Otherwise, SMART was immune from liability. Because the effect of the trial court's ruling was to deny SMART's claim of immunity, we have jurisdiction to address this issue pursuant to MCR 7.203(A) and MCR 7.202(6)(a)(v).

A motion pursuant to MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion under subrule (C)(10), we consider "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621.

The trial court erroneously determined that plaintiff presented evidence establishing a justiciable question of fact regarding whether Perry operated the bus negligently. It is well settled that, absent evidence of other negligence pertaining to the operation of a bus, a plaintiff bus passenger may not recover for injuries sustained when the bus suddenly stopped because such stops are normal incidents of travel. *Russ v Detroit*, 333 Mich 505, 508; 53 NW2d 353 (1952); *Sherman v Flint Trolley Coach, Inc*, 304 Mich 404, 416; 8 NW2d 115 (1943); *Zawicky v Flint Trolley Coach Co, Inc*, 288 Mich 655, 658-659; 286 NW 115 (1939). Here, the record contains no evidence that Perry operated the bus negligently. The only evidence of the bus's speed near the time that plaintiff was ejected from her wheelchair shows that Perry was driving within the 35-mile-per-hour speed limit. Plaintiff contends that Perry operated the bus negligently because Perry failed to anticipate that the green traffic signal light would change to yellow. This argument is untenable, however, because Perry did not act negligently by traveling within the speed limit while the traffic signal light was green. Further, the mere fact that an injury occurred does not itself indicate that Perry operated the bus negligently. See *id.* at 659. Accordingly, plaintiff failed to present evidence establishing a justiciable question of fact regarding whether Perry operated the bus negligently. Thus, summary disposition

was appropriate on this basis, and the trial court's decision to the contrary was erroneous.

IV. DUTY TO APPLY SEAT BELTS

On cross-appeal, plaintiff argues that the trial court erroneously determined that SMART did not owe her a duty to secure her in her wheelchair using a personal restraint such as a seat belt or shoulder restraint. The trial court correctly determined that SMART owed no such duty. The Federal Transit Administration's (FTA) bulletin "Questions and Answers Concerning Common Wheelchairs and Public Transit" provides:

> **Does a wheelchair user have to use the seatbelt and shoulder harness?**
>
> Under the broad non-discrimination provisions in Section 37.5 of the DOT's ADA regulations [49 CFR 37.5], *a transit operator is not permitted to mandate the use by wheelchair users of seatbelts and shoulder harnesses, unless the operator mandates the use of these devices by all passengers*, including those sitting in vehicle seats. For example, on fixed route buses, if none of the other passengers are required to wear shoulder belts then neither can the person in the mobility device be required to do so.
>
> Transit operators may establish a policy that requires the seatbelt and shoulder harness to be used by all riders, including those who use wheelchairs as well as those who use vehicle seats, if seatbelts and shoulder harnesses are provided at all seating locations. [Emphasis added.]

Thus, where, as here, a transit operator has not adopted a policy requiring all passengers to wear restraints, the operator may not require passengers in wheelchairs to wear restraints.

Further, 49 CFR 37.165(f) provides that the personnel of transit operators "shall assist individuals with disabilities with the use of securement systems" "[w]here neces-

sary or upon request . . . ." Therefore, according to 49 CFR 37.165(f), a regulation promulgated by the DOT, and the FTA's interpretation of the DOT's nondiscrimination regulation, transit operators may not place personal restraints on passengers in wheelchairs absent some indication by the passenger that he or she wishes to wear one. Pursuant to 42 USC 12149(a), the United States Congress conferred on the Secretary of Transportation the obligation to issue regulations pertaining to public transportation other than by aircraft and certain rail operations. Congress directed that "[t]he regulations . . . shall include standards applicable to facilities and vehicles[.]" 42 USC 12149(b). "When Congress has . . . [given] an express delegation of authority to [an] agency to elucidate a specific provision of the statute by regulation, . . . any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v Mead Corp*, 533 US 218, 227; 121 S Ct 2164; 150 L Ed 2d 292 (2001) (quotation marks and citation omitted). The FTA is an agency under the direction of the DOT, which Congress has expressly invested with authority to promulgate the relevant public-transit regulations at issue here, and plaintiff has not suggested that the DOT regulations are "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Id*.

Accordingly, we conclude that the trial court properly granted summary disposition for SMART on the basis that it had no duty to secure plaintiff using a personal restraint such as a seat belt or shoulder restraint.

V. GROSS NEGLIGENCE

Finally, plaintiff argues that the trial court erroneously granted summary disposition for Perry on plaintiff's gross negligence claim. MCL 691.1407(2) sets

forth the standard for governmental immunity pertaining to individual actors and employees of governmental agencies. The subsection provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

The parties do not dispute that Perry was driving the bus within the scope of her authority or that SMART was engaged in the exercise or discharge of a governmental function. Rather, plaintiff argues that Perry acted with gross negligence by failing to secure her using a personal restraint and by suddenly stopping the bus with such force that plaintiff was ejected from her wheelchair.

The Legislature has defined "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden v Rozwood*, 461 Mich 109, 122-123;

597 NW2d 817 (1999). "If reasonable jurors could honestly reach different conclusions regarding whether conduct constitutes gross negligence, the issue is a factual question for the jury. However, if reasonable minds could not differ, the issue may be determined by a motion for summary disposition." *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010).

Plaintiff's argument that Perry's failure to secure her using a personal restraint constituted gross negligence lacks merit. As previously discussed, SMART had no duty to apply a restraint such as a seat belt or shoulder restraint on plaintiff. In fact, if Perry had done so absent plaintiff's request, she would have violated DOT regulations promulgated to effectuate the purposes of the ADA. See 49 CFR 37.1; 49 CFR 37.5. Accordingly, it cannot be said that Perry's failure to apply a restraint constituted "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a).

Moreover, Perry's actions did not constitute "the proximate cause" of plaintiff's injuries as required by MCL 691.1407(2)(c). A "determination whether a governmental employee's conduct constituted gross negligence that proximately caused the complained-of injury under MCL 691.1407 is generally a question of fact, but, if reasonable minds could not differ, a court may grant summary disposition." *Briggs v Oakland Co*, 276 Mich App 369, 374; 742 NW2d 136 (2007). The phrase "the proximate cause" in MCL 691.1407(2)(c) requires that "the [governmental] employee's conduct . . . be 'the one most immediate, efficient, and direct cause preceding an injury.' " *Curtis v City of Flint*, 253 Mich App 555, 563; 655 NW2d 791 (2002), quoting *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

Here, plaintiff's ejection from her wheelchair occurred when Perry applied the brakes to stop for a yellow traffic signal light. Thus, the application of the brakes was " 'the one most immediate, efficient, and direct cause preceding [plaintiff's] injury,' " *Curtis*, 253 Mich App at 563, quoting *Robinson*, 462 Mich at 459, and Perry's failure to secure plaintiff with a personal restraint was not the proximate cause of plaintiff's injuries. Moreover, the record does not indicate that Perry acted with gross negligence when she applied the brakes. As previously discussed, plaintiff failed to present evidence establishing a justiciable question of fact regarding whether Perry operated the bus negligently. Accordingly, there can be no justiciable question of fact regarding whether Perry operated the bus with gross negligence. The trial court therefore properly granted summary disposition for Perry on plaintiff's gross negligence claim.

Affirmed in part and reversed in part. SMART, being the prevailing party, may tax costs pursuant to MCR 7.219.

RONAYNE KRAUSE, J., concurred with DONOFRIO, P.J.

STEPHENS, J. (*concurring in part and dissenting in part*). I respectfully concur in part and dissent in part. While I agree that the trial court properly granted summary disposition regarding the claim of gross negligence, I disagree that the trial court erred in only granting in part SMART's motion for summary disposition. Because I conclude that the trial court properly determined that defendants owed plaintiff a duty to advise her of the availability of a seat belt, that there is a genuine issue of material fact relating to whether a sudden stop caused plaintiff's injuries, and that the

motor vehicle exception to governmental immunity applies, I would affirm in whole.

The majority correctly notes that federal regulations precluded defendants from *requiring* plaintiff to utilize a seat belt to restrain her in her wheelchair. However, I am not persuaded that the federal prohibition in question eliminated a duty to inform plaintiff that a shoulder restraint was available for wheelchair users so that she could decide whether she wished to use it. The federal regulations do not prohibit, restrict, or comment in any specific way about a transportation provider's responsibility to advise passengers in wheelchairs of available seat belts. However, appendix D, subpart G, § 37.165 to 49 CFR, part 37, which represents the Department of Transportation's interpretation of 49 CFR, part 37, exhorts the public transportation authority's personnel to "ensure that a passenger with a disability is able to take advantage of the accessibility and safety features on vehicles." This arguably includes apprising the passenger of the existence of the accessibility features, because a passenger cannot take advantage of a feature of which he or she is unaware. The record reveals that plaintiff had requested to be positioned behind the driver's seat to minimize her mobility and limit the risk of being discharged from her wheelchair. It further indicates that Perry had attempted to secure the wheelchair with a lap belt, which proved to be too small. Under those circumstances, Perry would have been aware that plaintiff would have likely welcomed information regarding the availability of a shoulder restraint. Consequently, I do not share the majority's concern that to provide plaintiff with information regarding the shoulder restraint would be "contrary to the tenet that disabled passengers are to be treated the same as able-bodied passengers."

Likewise, I disagree with the majority's conclusion that the motor vehicle exception to governmental immunity is inapplicable under the facts of this case. My disagreement with the majority regarding the motor vehicle exception arises from our differing interpretations of the term "loading." The parties in this case cite and discuss at some length the significance of the Michigan Supreme Court's order in *Martin v Rapid Inter-Urban Partnership*, 480 Mich 936 (2007). After quoting the relevant language of MCL 691.1405, the Supreme Court concluded that the plaintiff had alleged the occurrence of an injury resulting from the negligent operation of a motor vehicle, explaining:

> In this case, the plaintiff alleges that she slipped and fell down the steps of a shuttle bus owned and operated by the defendants as she was attempting to exit the bus. *The loading and unloading of passengers is an action within the "operation" of a shuttle bus*. Accordingly, the plaintiff has satisfied the exception to governmental immunity set forth in MCL 691.1405. [*Id*. (emphasis added).]

In this case, the purported negligence of SMART, through Perry, involves the failure to mention the availability of a seat belt capable of strapping plaintiff into her wheelchair. I conclude that this constitutes a component of the loading of passengers in wheelchairs, "an action within the 'operation' of a shuttle bus." *Martin*, 480 Mich at 936. Plaintiff is essentially arguing that in failing to apprise her of the available restrains, defendants prevented her from being properly and completely loaded into the vehicle, which subsequently led to her injury. I would hold that "plaintiff has satisfied the exception to governmental immunity set forth in MCL 691.1405." *Id*.

Further, I disagree with the majority's conclusion that plaintiff failed to present a genuine issue of mate-

rial fact regarding whether Perry's alleged sudden stopping of the vehicle constituted a negligent act. The only evidence of the bus's speed near the time of plaintiff's ejection from her wheelchair shows that Perry was driving within the posted 35-miles-per-hour speed limit. However, the record does not specify with certainty at what moment or within what distance from the yellow traffic control light Perry began applying the bus's brakes. While Perry estimated that she began braking within approximately three car lengths of the traffic signal, I conclude that an inference of negligence reasonably arises from the fact that Perry's braking of the bus at a traffic signal light was sudden enough to dislodge plaintiff from her wheelchair to the floor of the bus with enough force to break both her ankles. Consequently, I would permit a jury to determine whether Perry committed a negligent act that caused plaintiff's injury.

Finally, I join the majority's holding regarding plaintiff's issues on cross-appeal. As stated above, though I do believe that defendants had a duty to inform plaintiff of the availability of the shoulder restraint, defendants did not have a duty to actually apply that restraint absent a request. Additionally, while I have concluded that plaintiff adequately set forth evidence to support her claim of negligence, I do not believe that the record demonstrates sufficient evidence to maintain an action for gross negligence against Perry.

TER BEEK v CITY OF WYOMING

Docket No. 306240. Submitted July 11, 2012, at Grand Rapids. Decided July 31, 2012, at 9:15 a.m. Leave to appeal granted, 493 Mich 957.

John Ter Beek filed an action in the Kent Circuit Court against the city of Wyoming, seeking declaratory relief to have a zoning ordinance declared void. Defendant had enacted a zoning ordinance that prohibits uses that are contrary to federal law, state law or local ordinance. Violations of the city's zoning ordinances are punishable by civil sanctions, and zoning violations are also subject to injunctive relief pursuant to the Zoning Enabling Act, MCL 125.3407. Plaintiff, who is a qualified medical-marijuana patient, MCL 333.26424a, under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., lives within the city limits, where he grows and uses marijuana for medical purposes in his home. Both parties moved for summary disposition. Plaintiff argued that because the federal controlled substances act (CSA), 21 USC 801 *et seq*., prohibits the use, manufacture, or cultivation of marijuana, the ordinance by extrapolation would prohibit the use, manufacture, or cultivation of marijuana for medical use. Thus, the ordinance would conflict with and was preempted by the MMMA, which allows qualified medical-marijuana use, manufacture, and cultivation. Defendant argued that the zoning ordinance was not preempted by the MMMA; rather, the CSA preempted the MMMA. The court, Dennis B. Leiber, J., denied plaintiff's declaratory relief request and granted summary disposition in favor of defendant, concluding that the CSA preempted the MMMA because the MMMA was an obstacle to the purposes and objectives of Congress as specified in the CSA. Plaintiff appealed.

The Court of Appeals *held*:

1. A city ordinance that purports to prohibit what a state statute permits is void. A state statute preempts regulation by an inferior government when the local regulation directly conflicts with the statute or when the statute completely occupies the regulatory field. A direct conflict exists when the local regulation prohibits what the statute permits. The MMMA provides that a qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or

penalty in any manner for the medical use of marijuana. Federal law, under 21 USC 841(a)(1), prohibits any person from knowingly or intentionally manufacturing, distributing, or possessing with intent to manufacture, distribute or dispense a schedule I controlled substance such as marijuana. The ordinance, which prohibits uses that are contrary to federal law, state law or local ordinance, is void because it conflicts with and is preempted by MCL 333.26424(a). The CSA in conjunction with defendant's zoning ordinance makes any medical use of marijuana under the MMMA a violation of defendant's zoning ordinance. If their marijuana use conforms to the limitations in the MMMA, under MCL 333.26424(a) registered, qualified medical-marijuana users may not be subjected to either civil or criminal penalties. The ordinance directly conflicts with the MMMA because the ordinance expressly prohibits uses by registered medical-marijuana users that are contrary to federal law by providing penalties of fines and injunctive relief, which the MMMA expressly prohibits. The sanction imposed pursuant to the ordinance rests on the premise that the statutorily allowed medical use of marijuana constitutes criminal activity, which directly conflicts with the MMMA. Civil injunctive relief that could be imposed under the ordinance to prohibit the medical use of marijuana within the city limits constitutes a penalty as proscribed by MCL 333.26424(a).

2. A federal statute will not preempt a state statute unless Congress clearly manifested an intent to do so. The only type of preemption at issue in this case was conflict preemption. Impossibility conflict preemption, which occurs when compliance with both federal and state regulations is a physical impossibility, and obstacle conflict preemption, which occurs when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, are the two ways that conflict preemption can occur. It is not physically impossible to comply with logically inconsistent statutes when a person can simply refrain from doing the activity that one statute purports to permit and the other statute purports to proscribe. The MMMA is not preempted by the CSA on the basis of impossibility conflict preemption because it is not physically impossible to comply with both the MMMA and the CSA at the same time. While the CSA proscribes marijuana in all form, the MMMA permits, but does not mandate, medical use of marijuana in limited circumstances and grants immunity from penalties or prosecution to qualified and registered patients. Because the medical use permitted by the MMMA is not mandatory, it is not physically impossible to comply with both the federal and state statutes simultaneously. The MMMA is also not preempted by the CSA on the basis of obstacle

conflict preemption. To determine whether a state statute stands as an obstacle to the full purposes and objectives of Congress, the purposes and objectives of the state statute at issue must also be identified. Congress clearly intended to comprehensively regulate all uses of marijuana when it enacted the CSA. The MMMA was enacted to allow for a limited class of individuals the medical use of marijuana for the health and welfare of the state's citizens. The MMMA, under MCL 333.26422, recognizes that federal law currently prohibits any use of marijuana, that almost all marijuana-based arrests are made under state law, and that the state law would not affect the federal law. Read together with MCL 333.26422(b) and (c), the immunity granted to qualified, registered medical-marijuana users under MCL 333.26424(a) was clearly not intended to exempt them from federal prosecution under the CSA. The CSA does not preempt the MMMA's grant of immunity because Congress cannot require the states to enforce federal law. Accordingly, the grant of immunity by MCL 333.26424(a) to qualified registered medical marijuana users is not preempted by the CSA because it only grants immunity from state prosecution and therefore does not stand as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.

Reversed and remanded.

1. STATUTES — MUNICIPAL CORPORATIONS — ORDINANCES — PREEMPTION — DIRECT CONFLICT — MICHIGAN MEDICAL MARIHUANA ACT.

A city ordinance that purports to prohibit what a state statute permits is void; a state statute preempts regulation by an inferior government when the local regulation directly conflicts with the statute or when the statute completely occupies the regulatory field; a direct conflict exists when the local regulation prohibits what the statute permits; the Michigan Medical Marihuana Act, which grants immunity from prosecution to qualified, registered medical-marijuana users for the use, manufacture, and cultivation of marijuana for medical purposes, preempts a local ordinance that criminalizes all uses of marijuana through its incorporation of the federal controlled substances act (MCL 333.26421 *et seq*.; 21 USC 801 *et seq*.).

2. STATUTES — FEDERAL PREEMPTION — CONFLICT PREEMPTION.

A federal statute will not preempt a state statute unless Congress clearly manifested an intent to do so; impossibility conflict preemption occurs when compliance with both federal and state regulations is a physical impossibility; obstacle conflict preemption occurs when state law stands as an obstacle to the accomplishment

and execution of the full purposes and objectives of Congress; it is not physically impossible to comply with logically inconsistent statutes when a person can simply refrain from doing the activity that one statute purports to permit and the other statute purports to proscribe; to determine whether a state statute stands as an obstacle to the full purposes and objectives of Congress, the purposes and objectives of the state statute at issue must also be identified.

3. STATUTES — FEDERAL PREEMPTION — MICHIGAN MEDICAL MARIHUANA ACT.

Section 4(a) of the Michigan Medical Marihuana Act, MCL 333.26424(a), which grants immunity from prosecution to qualified registered medical-marijuana users for the use, manufacture, and cultivation of marijuana for medical purposes, is not preempted by the federal controlled substances act, 21 USC 801 *et seq*., which prohibits all uses of marijuana under 21 USC 841(a)(1), because it only grants immunity from state prosecution and therefore does not stand as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.

Daniel S. Korobkin, *Michael J. Steinberg*, *Kary L. Moss*, *Michael O. Nelson*, and *Miriam J. Aukerman* for John Ter Beek.

Sluiter, Van Gessel, Winther & Carlson, PC (by *Jack R. Sluiter* and *Arthur P. Winther*), for the city of Wyoming.

Amicus Curiae:

Donald L. Knapp, Jr., Corporation Counsel, and *Michael E. Fisher*, Assistant Corporation Counsel, for the city of Livonia.

Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

HOEKSTRA, J. In this declaratory judgment action, plaintiff, John Ter Beek, appeals as of right the trial court's order granting summary disposition in favor of defendant, the city of Wyoming. Plaintiff sought to void

defendant's zoning ordinance on state preemption grounds because the zoning ordinance was enacted to prohibit conduct permitted by the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. Because we conclude that defendant's zoning ordinance directly conflicts with the MMMA, and the federal controlled substances act (CSA), 21 USC 801 *et seq.*, does not preempt § 4(a) of the MMMA, MCL 333.26424(a), we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 1, 2010, defendant amended its city code and enacted a zoning ordinance that provides: "Uses not expressly permitted under this article are prohibited in all districts. Uses that are contrary to federal law, state law or local ordinance are prohibited." Wyoming Ordinance, § 90-66. Violations of Wyoming's city code, including zoning violations, are punishable by "civil sanctions, including, without limitation, fines, damages, expenses and costs," Wyoming Ordinance, § 1-27(a), and zoning violations are further subject to injunctive relief pursuant to Michigan's zoning enabling act, MCL 125.3407.

Plaintiff, who is a qualified medical-marijuana[1] patient, lives within the city limits of Wyoming, where he grows and uses marijuana for medical purposes in his home, presumably in compliance with the MMMA. He has not been charged with violating the ordinance, nor has he been subjected to any penalties, fines, or injunctions.[2] After the enactment of defendant's zoning ordi-

[1] While the statute refers to "marihuana," by convention this Court uses the more common spelling "marijuana."

[2] We note that the issue of plaintiff's standing to challenge the ordinance was addressed by the trial court. The trial court relied on *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d

nance, plaintiff filed a complaint seeking declaratory relief against defendant. Plaintiff's first amended complaint alleged that because the federal CSA prohibits the manufacture and use of marijuana, which the CSA sanctions as a schedule I controlled substance, defendant's ordinance prohibits the use, manufacture, or cultivation of marijuana for medical purposes. Plaintiff's complaint further alleged that defendant's ordinance is invalid because the ordinance prohibits and makes punishable the use, manufacture, or cultivation of marijuana for medical purposes in direct conflict with the MMMA. On these grounds, plaintiff maintained that the ordinance conflicts with the MMMA and, therefore, is preempted by the MMMA, and, consequently, is invalid. Defendant's answer admits that "the cultivation, possession and distribution of marihuana are subject to the zoning code of Wyoming," but denies that its ordinance is preempted by the MMMA.

The parties filed competing motions for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff argued that the ordinance directly conflicted with the MMMA and was accordingly invalid. Plaintiff further maintained that the federal CSA did not preempt the MMMA. Defendant argued that its ordinance was not preempted by the MMMA because the ordinance enforced the federal prohibition on the cultivation and distribution of marijuana as set forth in the CSA and that the CSA preempted the MMMA.

After hearing arguments from both sides, the trial court found that the CSA preempted the MMMA be-

686 (2010), and found that plaintiff had standing because he has a right or interest in using and growing marijuana for medical purposes that would be affected by defendant's ordinance in a way that is different from the rights and interests of the public at large. Defendant does not raise the issue of standing on appeal, and at oral argument agreed that plaintiff has standing to maintain this action.

cause the MMMA stood as an obstacle to the purposes and objectives of Congress as specified in the CSA. Consequently, the trial court declined to decide whether the MMMA preempted defendant's ordinance and, accordingly, issued an order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant and denying plaintiff's request for declaratory relief.

II. STATE PREEMPTION OF THE WYOMING CITY ORDINANCE

On appeal, plaintiff reiterates his argument that defendant's ordinance is invalid because it conflicts with the MMMA. Accordingly, plaintiff requests that this Court reverse the finding of the trial court and remand with instructions to grant summary disposition in his favor and enter a declaratory judgment finding defendant's ordinance void and unenforceable to the extent that it prohibits the medical use of marijuana in accordance with the MMMA.

Whether a state statute preempts a local ordinance is a question of statutory interpretation and, therefore, a question of law that we review de novo. *Mich Coalition for Responsible Gun Owners v City of Ferndale*, 256 Mich App 401, 405; 662 NW2d 864 (2003). We also review de novo a decision to grant or deny a declaratory judgment; however, the trial court's factual findings will not be overturned unless they are clearly erroneous. *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996).

Further, we review de novo a trial court's decision to grant summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted

by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

A city ordinance that purports to prohibit what a state statute permits is void. *Walsh v City of River Rouge*, 385 Mich 623, 636; 189 NW2d 318 (1971). "A state statute preempts regulation by an inferior government when the local regulation directly conflicts with the statute or when the statute completely occupies the regulatory field." *USA Cash #1, Inc v City of Saginaw*, 285 Mich App 262, 267; 776 NW2d 346 (2009). A direct conflict exists between a local regulation and state statute when the local regulation prohibits what the statute permits. *Id.*

In its brief on appeal, defendant specifically acknowledges that the purpose of the ordinance "is to regulate the growth, cultivation and distribution of medical marihuana in the City of Wyoming by reference to the federal prohibitions regarding manufacturing and distribution of marihuana." In making this argument, defendant relies on 21 USC 841(a)(1), which makes it "unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ." Further, under 21 USC 812(c)(10), marijuana is a schedule I controlled substance; thus, manufacturing or possessing marijuana is generally prohibited under federal law. Consequently, these provisions of the CSA when read together with defendant's zoning ordinance, which makes any violation of federal law an unpermitted use of one's property,

cause any medical use[3] of marijuana pursuant to the MMMA on any property within the city of Wyoming to be a violation of defendant's zoning ordinance. Although plaintiff has not been punished for violating defendant's zoning ordinance, defendant's municipal code permits "civil sanctions, including, without limitation, fines, damages, expenses and costs" for violations of the code. Wyoming Ordinance, § 1-27(a). In addition, it cannot be disputed that if found in violation of Wyoming Ordinance, § 90-66, plaintiff would be subject to injunctive relief that would restrict the use of his property to purposes that would otherwise be permitted under the MMMA. See MCL 125.3407.

In contrast, the MMMA permits medical use as defined in MCL 333.26423(e), which includes use, possession, cultivation, delivery, and transfer. Further, the plain language of MCL 333.26424(a) provides immunity for a qualifying patient—which plaintiff is acknowledged to be—from being "subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege." Under these circumstances, the question presented regarding conflict preemption between the MMMA and defendant's ordinance is whether the possibility of plaintiff's being subject to the civil sanctions of the Wyoming Ordinance, § 1-27(a) if found in violation of Wyoming Ordinance, § 90-66, for engaging in activity otherwise permitted by the MMMA constitutes a "penalty in any manner" prohibited by MCL 333.26424(a).

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[3] " 'Medical use' means the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(e).

In addressing the issue of statutory interpretation, we apply the rule of statutory construction that "[t]he words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). Further, we presume that the meaning as plainly expressed in the statute is what was intended. *People v Redden*, 290 Mich App 65, 76; 799 NW2d 184 (2010). We may consult dictionaries in order to determine the plain and ordinary meaning of words not defined by a statute. *Sanchez v Eagle Alloy, Inc*, 254 Mich App 651, 668; 658 NW2d 510 (2003).

The word "penalty" is undefined by MCL 333.26424(a). "Penalty" is defined as "a punishment imposed or incurred for a violation of law or rule . . . . [S]omething forfeited . . . ." *Random House Webster's College Dictionary* (2001). Further, penalty as used in the statute is modified by the prepositional phrase "in any manner." Plainly, this phrase is intended to require that the immunity from penalties is to be given the broadest application. Thus, any possible uncertainty about whether immunity under the MMMA is intended to cover both civil penalties—such as those permitted by defendant's ordinance—as well as criminal penalties is removed by the emphasis added by the language "in any manner." Thus, under MCL 333.26424(a), we conclude that it is clear that registered, qualified medical-marijuana users are not to be subject to any penalty, whether civil or criminal, if their medical use of marijuana conforms to the limitations set forth in the MMMA.

Applying the plain meaning of the words used in the immunity provision of the MMMA to defendant's ordinance, there can be no doubt that enforcement of the

ordinance could result in the imposition of sanctions that the MMMA does not permit. The provisions directly conflict because the ordinance expressly prohibits uses contrary to federal law and, therefore, provides for punishment of qualified and registered medical-marijuana users in the form of fines and injunctive relief, which constitute penalties that the MMMA expressly prohibits. See *Shelby Charter Twp v Papesh*, 267 Mich App 92, 105-106; 704 NW2d 92 (2005) ("A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits.").

Further, we find defendant's arguments to the contrary unavailing. To the extent that defendant argues that its ordinance does not conflict with the MMMA because it does not *require* criminal or civil penalties, we note that civil penalties in response to zoning violations are expressly provided for in defendant's city code. Wyoming Ordinance, § 1-27(a). The fact that civil penalties are not required does not save the ordinance from being in direct conflict with the MMMA because the mere possibility of such a penalty directly conflicts with the plain language of MCL 333.26424(a). Moreover, defendant's ordinance does not attempt to regulate lawful conduct, but attempts to completely ban the medical use of marijuana on the basis of the authority of the CSA, a federal criminal statute.[4] Thus, any sanction imposed pursuant to the ordinance rests on the premise that the statutorily allowed medical use of marijuana constitutes criminal activity, a proposition that is in direct conflict with the MMMA. In addition, we reject the notion implied in defendant's brief on appeal that

[4] We note that this is not a case in which zoning laws are enacted to regulate in which areas of the city the medical use of marijuana as permitted by the MMMA may be carried out.

enforcing the ordinance through the remedy of civil injunctive relief is not a penalty. We conclude that the civil injunctive relief that could be used to prohibit any medical use of marijuana within the city would constitute a "penalty in any manner" as proscribed by MCL 333.26424(a).

Accordingly, we hold that defendant's ordinance, Wyoming Ordinance, § 90-66, is void and unenforceable to the extent that it prohibits the medical use of marijuana in accordance with the MMMA because it is preempted by MCL 333.26424(a). *Id.*

III. FEDERAL PREEMPTION OF THE MMMA

Defendant alternatively argues that its ordinance is valid and enforceable even if it is preempted by the MMMA because the federal CSA preempts the state MMMA. Defendant argues that because the MMMA is preempted by federal law, it does not stand as an obstacle to the enforcement of its ordinance. Plaintiff argues that federal law does not preempt the MMMA.

Whether a federal statute preempts state law is a question of law that we review de novo. *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 138; 796 NW2d 94 (2010).

In every federal preemption case, we must first determine the intent of Congress in enacting the federal statute at issue. *Wyeth v Levine*, 555 US 555, 565; 129 S Ct 1187; 173 L Ed 2d 51 (2009). In all preemption cases, courts should assume that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (quotation marks and citations omitted). The areas of public health and drug regulation are traditionally left to the police powers of the states. See, e.g., *Gonzales v Oregon*, 546 US 243, 270; 126 S Ct 904;

163 L Ed 2d 748 (2006). Accordingly, we begin with the presumption that the MMMA is not preempted by the CSA. *Id.* at 270-271; see also *Wyeth*, 555 US at 565. Moreover, we note the United States Supreme Court's recent caution against a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" because "such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law." *Chamber of Commerce of the United States v Whiting*, 563 US ___, ___; 131 S Ct 1968, 1985; 179 L Ed 2d 1031 (2011) (quotation marks and citation omitted).

While there are three types of federal preemption, the only type of preemption at issue in this case is conflict preemption.[5] *Packowski*, 289 Mich App at 140. The United States Supreme Court has recognized two different ways that conflict preemption can occur. *Hillsborough Co, Fla v Automated Med Laboratories, Inc*, 471 US 707, 713; 105 S Ct 2371; 85 L Ed 2d 714 (1985). Impossibility conflict preemption occurs when "compliance with both federal and state regulations is a physical impossibility . . . ." *Id.* (quotation marks and citation omitted). Obstacle conflict preemption occurs "when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quotation marks and citation omitted).

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[5] Field preemption and express preemption are the two other types of federal preemption. *Packowski*, 289 Mich App at 140. Field preemption is not applicable because 21 USC 903 expressly declares that Congress did not intend to occupy the entire field of controlled substance regulation "unless there is a positive conflict" between the CSA and state law. Moreover, express preemption is inapplicable because there is no clearly stated intent to preempt state law in the CSA. Accordingly, on the basis of the plain language of the CSA, conflict preemption, which considers whether there is a direct conflict between the state and federal law, is the only type of preemption at issue.

Impossibility conflict preemption requires a finding that "compliance with both federal and state regulations is a physical impossibility . . . ." *Boggs v Boggs*, 520 US 833, 844; 117 S Ct 1754; 138 L Ed 2d 45 (1997) (quotation marks and citation omitted). The United States Supreme Court has held that it is not physically impossible to comply with logically inconsistent statutes when a person can simply refrain from doing the activity that one statute purports to permit and the other statute purports to proscribe. See, e.g., *Barnett Bank v Nelson*, 517 US 25, 31; 116 S Ct 1103; 134 L Ed 2d 237 (1996) (finding that preemption on the basis of impossibility inapplicable when a federal statute authorized national banks to do something that state law prohibited).[6]

As noted previously, the CSA proscribes marijuana in all forms, medicinal or otherwise. The MMMA, however, permits, but does not mandate, medical use of marijuana in limited circumstances and grants immunity from penalties or prosecutions to qualified and registered patients. Because the medical use permitted by the MMMA is not mandatory, it is not physically impossible to comply with both statutes simultaneously. Thus, we conclude that because it is not physically impossible to comply with both the MMMA and the CSA at the same time, the MMMA is not preempted by the CSA on the basis of impossibility conflict preemption.[7]

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[6] The doctrine of impossibility preemption is rarely applied. Indeed, the impossibility preemption test has been described as "vanishingly narrow." Nelson, *Preemption*, 86 Va L R 225, 228 (2000).

[7] Our conclusion is consistent with the conclusions reached by the California and Oregon courts, both of which addressed whether their state medical-marijuana laws were preempted by the CSA on grounds of impossibility preemption. Both state courts have concluded that their state laws were not preempted by federal law on the basis of impossibility

The second type of conflict preemption—obstacle preemption—occurs "when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough Co*, 471 US at 713. Accordingly, the purposes and objectives of Congress must be identified. See *id.* (noting that in the absence of express preemption language, Congress's intent to preempt state law may be inferred in certain circumstances). Moreover, to determine whether a state statute stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, the purposes and objectives of the state statute at issue must also be identified. See *Willis v Winters*, 350 Or 299, 312; 253 P3d 1058 (2011), citing *Florida Lime & Avocado Growers, Inc v Paul*, 373 US 132, 144-146; 83 S Ct 1210; 10 L Ed 2d 248 (1963).

In *Gonzales v Raich*, 545 US 1, 12-13; 125 S Ct 2195; 162 L Ed 2d 1 (2005), the United States Supreme Court explained:

> The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels.
>
> To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.

With regard to marijuana, Congress classified the drug as a schedule I controlled substance, meaning that

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preemption. See *Emerald Steel Fabricators, Inc v Bureau of Labor & Indus*, 348 Or 159, 176; 230 P3d 518 (2010); *San Diego Co v San Diego NORML*, 165 Cal App 4th 798, 824-825; 81 Cal Rptr 3d 461 (2008); *Qualified Patients Ass'n v City of Anaheim*, 187 Cal App 4th 734, 758-759; 115 Cal Rptr 3d 89 (2010).

Congress did not recognize an accepted medical use for the drug. *Id.* at 14; 21 USC 812(b)(1) and (c). Thus, in enacting the CSA, Congress expressed a clear intention to comprehensively regulate all uses of marijuana. See *Gonzales*, 545 US at 14-15 (noting that because Congress classified marijuana as schedule I controlled substance, the manufacture, distribution or possession of it became a criminal; offense).

"The purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana, and the act declares this purpose to be an 'effort for the health and welfare of [Michigan] citizens.' " *People v Kolanek*, 491 Mich 382; 817 NW2d 528 (2012), quoting MCL 333.26422(c). The ordinance at issue in this case conflicts with § 4(a) of the MMMA, which grants immunity to medical-marijuana users and provides in pertinent part that a "qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege . . . ." MCL 333.26424(a). While the grant of immunity set forth in § 4(a) does not specifically limit its prohibition on arrest, prosecution, or penalty to state law, it cannot be disputed that state medical-marijuana laws do not and cannot supersede federal laws criminalizing the possession of marijuana. *United States v Hicks*, 722 F Supp 2d 829, 833 (ED Mich, 2010).

Moreover, MCL 333.26422(c) acknowledges that "[a]lthough federal law currently prohibits any use of marihuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law." Additionally, MCL 333.26422(b) recognizes that 99 out of every 100 marijuana-based arrests in the United States are made under state law. Accordingly,

the statute declares that "*changing state law* will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana." *Id*. (emphasis added). Accordingly, the MMMA itself recognizes the federal policy regarding marijuana and acknowledges that state law will not affect the federal law.

It is well established that different provisions of a statute that relate to the same subject matter are *in pari materia* and must be read together as one law. *McNeil v Charlevoix Co*, 275 Mich App 686, 701; 741 NW2d 27 (2007). Moreover, "[p]roper application of the in pari materia rule gives the fullest possible effect to the legislative purpose underlying harmonious statutes without overreaching, unreasonableness, or absurdity. If multiple statutes can be construed in a way that avoids conflict, that construction should control." *Ryan v Dep't of Corrections*, 259 Mich App 26, 30; 672 NW2d 535 (2003) (citations omitted).

Therefore, when the immunity granted in MCL 333.26424(a) is read in context with MCL 333.26422(b) and (c), it is plain that the immunity was not intended to exempt qualified medical-marijuana users from federal prosecutions. Specifically the language in MCL 333.26422(b) and (c) refers to changing state law and acknowledges that federal law prohibits the medical use of marijuana. Moreover, the proclamation in MCL 333.26422(b) that changing state law will protect "the vast majority of seriously ill people who have a medical need to use marihuana" from arrest, instead of stating that the change in the law will protect all qualified medical-marijuana users from arrest, acknowledges that users of marijuana for medical purposes are still subject to federal prosecution. Further, construing MCL 333.26424(a) to grant immunity only from state pros-

ecution and other penalties avoids the absurd result that the MMMA purportedly preempts federal prosecutions, and avoids conflict with the CSA. See *Ryan*, 259 Mich App at 30 (when construing multiple statutes together, this Court should arrive at a construction that avoids absurd results or conflicts, if possible). The court in *Hicks*, 722 F Supp 2d at 833, followed this approach when it cited MCL 333.26422(c) and noted that "the MMMA specifically acknowledges that it does not supercede [sic] or alter federal law." Therefore, we conclude that the immunity granted under the statute was not intended to include protection from federal prosecutions. See *Hicks*, 722 F Supp 2d at 833.

Moreover, the MMMA's decriminalization of the medical use of marijuana is not contrary to the CSA's provisions punishing all medical uses of marijuana. The CSA provisions do not preempt the MMMA's grant of immunity as found in MCL 333.26424(a) because it is well established that Congress cannot require the states to enforce federal law. See, e.g., *Printz v United States*, 521 US 898, 924; 117 S Ct 2365; 138 L Ed 2d 914 (1997) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts . . . .") (quotation marks and citation omitted); *New York v United States*, 505 US 144, 166; 112 S Ct 2408; 120 L Ed 2d 120 (1992) ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."). Thus, while Congress can criminalize all uses of medical marijuana, it cannot require the states to do the same. *Printz*, 521 US at 924; New York, 505 US at 166. Accordingly, Michigan is not required to criminalize all medical uses of marijuana,

and the immunity afforded to qualified patients for the medical use of marijuana by MCL 333.26424(a) is permissible. Accordingly, we conclude that the immunity provision of MCL 333.26424(a) is not preempted by the CSA because it only grants immunity from state prosecution and, therefore, does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

IV. CONCLUSION

Defendant's ordinance is void and unenforceable to the extent that it purports to sanction the medical use of marijuana in conformity with the MMMA because the ordinance directly conflicts with MCL 333.26424(a). *Walsh*, 385 Mich at 636. Moreover, MCL 333.26424(a) is not preempted by the CSA because the limited grant of immunity from a "penalty in any manner" pertains only to state action and does not purport to interfere with federal enforcement of the CSA. Accordingly, we reverse the trial court's grant of summary disposition in favor of defendant and remand for entry of summary disposition in favor of plaintiff.

Reversed and remanded. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, a public question being involved.

SHAPIRO, P.J., and WHITBECK, J., concurred with HOEKSTRA, J.

PEOPLE v KING

Docket No. 301793. Submitted March 6, 2012, at Grand Rapids. Decided July 31, 2012, at 9:20 a.m. Convening of special panel declined, 297 Mich App 802. Leave to appeal denied, 493 Mich 938.

Raymond E. King was convicted by a jury in the Kent Circuit Court of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b)(*iii*), for engaging in sexual acts with his 13-year-old granddaughter. The court, Mark A. Trusock, J., sentenced defendant to two concurrent prison terms of 12 to 30 years and to lifetime electronic monitoring pursuant to MCL 750.520n following his release. Defendant appealed.

The Court of Appeals *held*:

1. The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, but that right is subject to reasonable restrictions. The Michigan Rules of Evidence do not infringe on a defendant's constitutional right to present a defense unless they are arbitrary or disproportionate to the purposes they are designed to serve. In this case, defendant failed to establish that constitutional error occurred when he failed argue that any rule of evidence was arbitrary or disproportionate to its purpose either in general or under the facts of this case and, in any event, defendant was allowed to present evidence in the form of his testimony, that of his wife, and of several relatives, which, if believed by the jury, would have provided him a complete defense to the charges brought against him.

2. Evidence of bad acts committed by witnesses may be admitted if the evidence is offered for a proper purpose, is relevant, and the relevance of the evidence is not substantially outweighed by the danger of unfair prejudice. As the finder of fact, the jury is generally entitled to weigh all evidence that might bear on the truth or accuracy of a witness's testimony. In this case, defendant sought to present evidence that his daughter, the victim's mother, had required her children to steal things for her. Defendant failed to show a logical link between evidence of theft and fabrications of allegations of sexual abuse. Under the circumstances, the evidence of theft was not relevant and was properly excluded.

3. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity with it

on a particular occasion, except evidence of a pertinent trait of character offered by an accused. An accused has an absolute right to introduce evidence of his or her character to prove that he or she could not have committed the crime. In this case, defendant sought to admit evidence of his reputation for interacting with teenagers at a juvenile detention facility where he was employed. Defendant had a right to present the evidence, and the trial court improperly excluded it. However, the preserved trial error of excluding proposed character evidence is not grounds for reversal if, after an examination of the entire cause, it does not affirmatively appear that it is more probable than not that the error was outcome determinative. In this case, the proposed character evidence had limited value, in that it had little relevance to the matters at issue in the case. Further, other evidence had already informed the jury of the defendant's longtime employment as a youth specialist at a juvenile detention facility, and it would have been reasonable for the jury to infer that if defendant had a reputation for inappropriate behavior that he would not have remained employed there. Additionally, allowing the character evidence might have opened the door to cross-examination and the net effect might have been more harmful than helpful, defendant was able to present evidence that he behaved appropriately with respect to other teenage relatives in his home, and the prosecution presented a very strong case of defendant's guilt. Thus, it did not appear more probable than not that the error was outcome determinative.

4. Generally, CSC-I is punishable by imprisonment for life or for any term of years. However, for a violation which is committed by an individual 17 years of age or older against an individual less than 13 years of age, the offense is punishable by imprisonment for life or any term of years, but not less than 25 years. In addition to any other penalty imposed, under MCL 750.520b(2)(d) the court must sentence the defendant to lifetime electronic monitoring under MCL 750.520n. Second-degree criminal sexual conduct (CSC-II) is punishable by not more than 15 years' imprisonment. In addition, the court must sentence the defendant to lifetime electronic monitoring if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age. MCL 750.520n(1) provides that a person convicted of CSC-I or CSC-II committed by an individual 17 years of age or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring. MCL 750.520n(1) is ambiguous when read together with MCL 750.520b(2)(d), but the more reasonable construction of MCL 750.520n(1) is that lifetime electronic monitoring of a person convicted of either CSC-I or CSC-II is limited to those situations in

which the victim was under age 13. Accordingly, the Court would have vacated the order for lifetime electronic monitoring but for MCR 7.215(J)(1), which required it to follow the rule established in *People v Brantley*, 296 Mich App 546 (2012). A special panel should be convened under MCR 7.215(J)(3) for the purpose of resolving the conflict that would have been created except for the provisions of MCR 7.215(J)(1).

Affirmed.

FITZGERALD, J., concurring in part and dissenting in part, disagreed with the majority that lifetime electronic monitoring did not apply to persons convicted of CSC-I unless the victim was under 13 years of age. The age limitations within the text of MCL 750.520n(1) only modify the statute's reference to the CSC-II statute. Thus, *Brantley* correctly resolved the issue when it held that any defendant convicted of CSC-I under MCL 750.520b, regardless of the age of the defendant or the age of the victim, must be ordered to submit to lifetime electronic monitoring and the convening of a special panel was not necessary. In all other respects, Judge FITZGERALD concurred with the majority opinion.

1. CRIMINAL LAW — CONSTITUTIONAL LAW — OPPORTUNITY TO PRESENT A DEFENSE — RULES OF EVIDENCE.

The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, but that right is subject to reasonable restrictions; Michigan's Rules of Evidence do not infringe on a defendant's constitutional right to present a defense unless they are arbitrary or disproportionate to the purposes they are designed to serve (US Const, Am VI, US Const, Am XIV).

2. CRIMINAL LAW — EVIDENCE — CHARACTER OF THE ACCUSED.

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity with it on a particular occasion, except evidence of a pertinent trait of character offered by an accused; an accused has an absolute right to introduce evidence of his or her character to prove that he or she could not have committed the crime, but the preserved trial error of excluding proposed character evidence is not grounds for reversal if, after an examination of the entire cause, it does not affirmatively appear that it is more probable than not that the error was outcome determinative (MRE 404[a][1]).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *William A. Forsyth*, Prosecuting At-

torney, and *Timothy K. McMorrow*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Douglas W. Baker*) for defendant.

Before: METER, P.J., and FITZGERALD and MARKEY, JJ.

MARKEY, J. Defendant appeals by right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b)(*ii*). The victim of the offenses was defendant's 13-year-old granddaughter. The trial court sentenced defendant to two concurrent prison terms of 12 to 30 years and to lifetime electronic monitoring, MCL 750.520n. Defendant asserts two evidentiary trial errors and also asserts that lifetime electronic monitoring is not authorized by law in this case. Regarding the last issue, we would vacate the order for lifetime electronic monitoring but for MCR 7.215(J)(1), which requires that we follow the rule of law established in *People v Brantley*, 296 Mich App 546; 823 NW2d 290 (2012). We explain our disagreement with *Brantley* in part II below and request that a conflict panel be convened. MCR 7.215(J)(2) and (3). We affirm.

I. EVIDENTIARY ISSUES

Defendant raises two evidentiary issues on appeal, framing each as a violation of his constitutional right to present a defense. Defendant first argues he was denied his constitutional right to present a defense because the trial court precluded presentation of purported evidence that his daughter Jennifer, the victim's mother, had in the past required her children to steal things for her. The defense theorized this evidence should be admitted under MRE 404(b) to show that Jennifer had

a plan, scheme, or system of enticing her own daughters into dishonest behavior to serve her own ends and that Jennifer and her daughters fabricated the allegations against defendant. Second, defendant asserts he was denied his constitutional right to present a defense when the trial court precluded testimony under MRE 404(a)(1) regarding defendant's reputation for positively interacting with teenagers at the Kent County Juvenile Detention Facility where defendant had been employed for many years as a youth specialist. To address defendant's arguments, we must first summarize some of the evidence presented at trial.

A. SUMMARY OF TRIAL TESTIMONY

Defendant's convictions arose out of a sexual assault committed on his granddaughter on October 26, 2008, when she was 13 years old. The victim did not live with defendant at the time, but that night she spent the night at his apartment after he picked her up from the Kent County Juvenile Detention Facility. She had been arrested for shoplifting. Matthew Fenske, superintendent of the detention facility, testified that records established that the victim was released to defendant's custody on the day in question. She returned with defendant to his apartment and slept in his bed that night. The victim testified that twice during the night defendant attempted vaginal intercourse, partially penetrating her. The victim also testified that defendant molested her and her sisters (JR and DR) on other occasions.

The trial court permitted the prosecution to present evidence under MRE 404(b) of sexual incidents between defendant and both JR and Jennifer. JR testified that defendant sexually touched her in 2004, when she, her mother, and siblings were staying with defendant. JR

was 13 at the time. During the visit, JR sometimes slept in defendant's bed. One time, when the victim was also in bed with their grandfather, JR awoke to find defendant's hand in her pants. JR testified defendant put his fingers in her vagina while he masturbated himself.

DR testified that although she had slept in her grandfather's bed once, nothing inappropriate had happened. DR also testified she had not seen anything inappropriate. DR remembered that the victim tried to wake her one night, but she could not understand what the victim was saying. According to DR, one time the victim had tried to tell her something about defendant and made "a little joke" about something going on. When DR stated that she was "gonna tell momma," the victim stated, "I'm just playing," and then, "I was just lying."

Jennifer testified that growing up, she did not live with her father but when she was 6 or 7 years old she started spending summers with him. When she was about 11 years old, she stayed with defendant for a couple of weeks when he was living in Chicago. According to Jennifer, one night defendant had sexual intercourse with her. Jennifer testified that she ran away for few days, but was returned to defendant's home. She never told anyone what happened, but she refused any further childhood visits with defendant.

During the investigation of this case, Jennifer secretly tape-recorded a conversation with defendant. In the conversation, defendant recalled "what happened between [Jennifer] and [defendant] when [Jennifer] was younger[.]" Defendant explained the incident as having woken up with Jennifer on top of him moving around and he was "feeling unloved" and "so alone." When confronted with the victim's allegations, defen-

dant did not deny them, but said he did not remember because of his use of drugs and alcohol.

Detective Daniel Adams interviewed defendant at the Kent County Juvenile Detention Facility where defendant was working. A tape recording of this interview was played for the jury. During the interview, defendant said he could not remember the alleged incidents because of drug and alcohol abuse.

In his defense, defendant presented the testimony of several relatives who were living in the Chicago household when Jennifer visited. They testified they observed no inappropriate sexual activity. Two nieces and a nephew testified they had stayed with defendant when they were in high school or grade school and nothing inappropriate happened. Another nephew, who was a minister, a high school principal, and a former superintendent at the detention facility, testified to defendant's stellar reputation for truth and honesty.

Defendant's wife, Tammi King, testified that on the night defendant picked the victim up from the detention facility, she observed defendant and the victim in the kitchen arguing over the shoplifting incident. Defendant slapped the victim, and Mrs. King tried to defuse tensions by offering to fix the victim something to eat. Afterward, she escorted the victim to an upstairs bedroom. Mrs. King went back downstairs, but later checked to confirm the victim was asleep in the upstairs bedroom. She went back downstairs, finished her work in the kitchen, and retired for the evening with defendant in their downstairs bedroom.

Defendant testified, denying that he sexually abused the victim, or JR, or Jennifer. With respect to Jennifer, however, he remembered a time when she was visiting only for a short time, maybe a week, and Jennifer had climbed atop him and rubbed against him in a sexual

manner. Defendant testified that he did not sexually respond. Defendant also testified that on one occasion the victim behaved similarly. He denied he initiating any sexually motivated contact with either Jennifer or the victim.

B. STANDARD OF REVIEW

A trial court's decision whether to admit or exclude evidence will be affirmed in the absence of a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). The trial court abuses its discretion when its decision is outside the range of principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). We review de novo the trial court's rulings on preliminary questions of law regarding the admissibility of evidence, such as the application of a statute or rule of evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A preserved trial error in admitting or excluding evidence is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Id*. at 495-496. Preserved nonstructural trial error of constitutional magnitude will not merit reversal if it is harmless beyond a reasonable doubt. *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998).

Whether a defendant was denied his constitutional right to present a defense is a question of law we review de novo. *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008). In this case, defendant did not preserve his constitutional claims by presenting them to the trial court. *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005). Appellate review of unpreserved constitutional claims is for plain error affecting the defendant's substantial rights. *People v Shafier*, 483 Mich 205, 219-220; 768 NW2d 305 (2009).

This requires the defendant to show that the plain error affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Moreover, reversal is warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings regardless of the guilt or innocence of the accused. *Id*.

C. RIGHT TO PRESENT A DEFENSE

Defendant's claim—that his constitutional right to present a defense was violated by the trial court's ruling excluding alleged evidence that Jennifer required her children to steal things for her benefit—is without merit. There is no doubt that based on the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's Compulsory Process or Confrontation Clauses, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986) (citation omitted); see also *People v Aspy*, 292 Mich App 36, 48-49; 808 NW2d 569 (2011). "Few rights are more fundamental than that of an accused to present evidence in his . . . own defense." *Unger*, 278 Mich App at 249. But this right is not unlimited and is subject to reasonable restrictions. *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998) (opinion by Thomas, J.). The right to present a complete defense "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v Mississippi*, 410 US 284, 295; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Michigan, like other states, "has a legitimate interest in promulgating and implementing its own rules concerning the conduct of trials." *Unger*, 278 Mich App at 250. And our Supreme Court has "broad latitude

under the Constitution to establish rules excluding evidence from criminal trials." *Scheffer*, 523 US at 308 (opinion by Thomas, J.). Thus, an "accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' " *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers*, 410 US at 302. The Michigan Rules of Evidence do not infringe on a defendant's constitutional right to present a defense unless they are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " *Scheffer*, 523 US at 308 (opinion by Thomas, J.), quoting *Rock v Arkansas*, 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37 (1987).

In this case, while defendant presents arguments that the trial court misapplied the Michigan Rules of Evidence by excluding certain evidence, he presents no argument whatsoever that any particular rule is arbitrary or disproportionate to the purposes it was designed to serve, either in general or as applied to the facts of this case. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Moreover, it is patent from a review of the trial record that defendant was allowed to present evidence in the form of his testimony, that of his wife, and of several relatives, which, if the jury believed, would have provided defendant a complete defense to the charges brought against him. Consequently, we reject defendant's claim that constitutional error occurred, either in the exclusion of other acts evidence or character evidence.

D. OTHER ACTS EVIDENCE

We also conclude that the trial court's ruling excluding purported evidence of theft by Jennifer and her

daughters was within the range of principled outcomes, and, therefore, not an abuse of discretion. See *Feezel*, 486 Mich at 192.

Defendant argues that the trial court erred in its pretrial ruling by relying on the prosecutor's argument that because no conviction existed, the proposed evidence was improper impeachment evidence of a crime under MRE 609.[1] On appeal the prosecution concedes that MRE 609 is not controlling on this issue, and that the trial prosecutor may have misspoken by citing MRE 609 rather than MRE 608, which permits attacking or supporting the credibility of witness with testimony of opinion or reputation regarding a witness's "character for truthfulness or untruthfulness . . . ." MRE 608(a). And, in general, "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." MRE 608(b). We decline this invitation to speculate, but we do agree with the prosecution's argument that this Court "will not reverse a trial court decision when the lower court reaches the correct result even if for a wrong reason." *Bauder*, 269 Mich App at 187. Moreover, in revisiting this issue during the course of the trial, the court ruled that the proposed evidence was not relevant, MRE 401, and, therefore, was inadmissible, MRE 402. We agree.

We initially note that the prosecution disputes that the excluded evidence exists, at least in admissible

[1] MRE 609 permits impeachment with evidence of a conviction for a crime with an element of theft that was punishable by imprisonment in excess of one year, if the conviction or resulting confinement occurred within the past 10 years and the court determines that the evidence has significant probative value on the issue of credibility. MRE 609(a)(2) and (c). "Evidence of juvenile adjudications is generally not admissible under this rule . . . ." MRE 609(e).

form. In arguing this issue during the trial, the prosecutor stated that the allegations regarding Jennifer came from unsubstantiated, anonymous hearsay contained in a Children's Protective Services (CPS) report. Defense counsel conceded the source of the information regarding Jennifer was a CPS report, apparently provided to the defense during discovery. Defense counsel never made, nor offered to make, an offer proof regarding what witnesses he would be able to present and what admissible testimony would substantiate the claims regarding Jennifer. See MRE 103. This failing by itself would support finding that the trial court did not abuse its discretion by excluding the proffered evidence. See *People v Paquette*, 114 Mich App 773, 781; 319 NW2d 390 (1982) (holding no basis for reversal exists when nothing in the record indicates the defendant could have produced the excluded evidence).

Additionally, we find without merit defendant's argument that the evidence should have been admitted under MRE 404(b) to show Jennifer had a plan, system, or scheme of manipulating her daughters into deceitful conduct. We recognize that MRE 404(b) is a rule of inclusion and allows evidence of other acts committed by witnesses, provided the evidence is offered for a proper purpose, is relevant, and the relevance of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 64 n 13, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991); MRE 403. But the touchstone of admissibility of evidence under MRE 404(b), as with all other evidence, is logical relevance. *VanderVliet*, 444 Mich at 61-62. Clearly, evidence is relevant when it affects the credibility of the victim and when it affects the credibility of witnesses who enhance

the victim's credibility. As the finder of fact, the jury is generally entitled to weigh all evidence that might bear on the truth or accuracy of a witness's testimony. *People v Layher*, 464 Mich 756, 765; 631 NW2d 281 (2001). In this case, however, defendant has failed to establish a logical link between the proffered other acts concerning theft and fabrications of allegations of sexual abuse. Because defendant failed to establish that the purported evidence was logically relevant, he failed to establish a touchstone element necessary for admissibility under MRE 404(b). *VanderVliet*, 444 Mich at 61-62, 74. Consequently, the trial court correctly ruled that the proposed evidence was not relevant, MRE 401, and thus was inadmissible, MRE 402.

Also unpersuasive is defendant's theory of admissibility: that the other acts evidence showed Jennifer used a common plan or scheme to manipulate her daughters into dishonest behavior to serve her own ends. To establish logical relevance under this theory of admissibility, the other acts and defendant's claim of fabrication must be "sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). To meet this criterion of similarity between the other acts (theft) and the fact to be proved (fabrication of sexual acts), there must be "a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." *Id*. at 64-65, quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249 (emphasis omitted). Jennifer's alleged common plan or scheme to manipulate her daughters into stealing things for her is too dissimilar to the victim's assertions of sexual abuse to demonstrate a common plan or scheme.

For all these reasons, we conclude that the trial court did not abuse its discretion by excluding the purported evidence of theft by Jennifer and her daughters.

E. CHARACTER EVIDENCE

Defendant argues that the trial court erred when it ruled that Fenske would not be permitted to answer defendant's question on cross-examination regarding defendant's reputation for interacting with teenagers at the Kent County Juvenile Detention Facility. Specifically, defendant asserts the testimony should have been permitted under MRE 404(a), which provides, in pertinent part:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Evidence of a pertinent trait of character offered by an accused . . . .

So, defendant argues, the court erred by restricting him to presenting evidence of reputation under MRE 608.

The prosecution concedes that MRE 404(a)(1) is the pertinent rule regarding the character evidence at issue and that an accused has "an absolute right to introduce evidence of his character to prove that he could not have committed the crime." *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986). Nevertheless, the prosecution asserts error did not occur because defendant's reputation for interaction with teenagers at his workplace is not probative of his character regarding sexual abuse of teenage females in his own household. The prosecution further contends that even if the trial court erred, the error was harmless because the evidence would have provided little benefit to defendant, see *id*.

at 129, and would have "opened the door" to evidence of defendant's inappropriate behavior with female coworkers. MRE 405(a).[2]

We agree with defendant that the trial court should have permitted him to introduce the proposed character evidence under MRE 404(a)(1). *Whitfield*, 425 Mich at 130. But we also agree with the prosecution that the error was harmless. For the reasons discussed in part I(C), the error is ordinary nonconstitutional trial error. The preserved trial error of excluding the proposed character evidence is not grounds for reversal because, after an examination of the entire cause, it does not affirmatively appear that it is more probable than not that the error was outcome determinative. *Lukity*, 460 Mich at 495-496.

First, character evidence of the type excluded here has limited value. "Both the value and the wisdom of presenting character evidence have been doubted. It is thought that such evidence typically adds little of relevance to the determination of the actual issues in a case and is likely to inject extraneous elements." *Whitfield*, 425 Mich at 129. Moreover, the fact that defendant likely behaved appropriately with teenage detainees was implicitly already before the jury, which had heard evidence of defendant's longtime employment as a youth specialist at the juvenile detention facility. It would be reasonable for the jury to infer that if defendant had a reputation for behaving inappropriately with teenage detainees, he would not have remained employed.

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[2] MRE 405(a) states: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct."

Second, as the prosecution argues, allowing the character evidence might have "opened the door" to cross-examination regarding specific instances of behavior, and the net effect of the evidence might have been more harmful than helpful to defendant. MRE 405(a).

Third, defendant was able to present direct evidence, through the testimony of several relatives, that he behaved appropriately with respect to teenage relatives in his home. This testimony was more pertinent to the charged offenses than Fenske's testimony could have been regarding defendant's reputation at his workplace.

Finally, the prosecution presented a very strong case of defendant's guilt. Defendant presented his own testimony that the offenses did not occur and that of his wife that the offenses could not have occurred. The jury obviously found the prosecution's evidence more credible than that of defendant and his wife. In light of the marginal value of Fenske's excluded testimony and our examination of the entire case, we are convinced that it does not affirmatively appear more probable than not that the error was outcome determinative. *Lukity*, 460 Mich at 495-496.

II. LIFETIME ELECTRONIC MONITORING

The Legislature in 2006 enacted several tie-barred acts[3] providing for lifetime electronic monitoring of certain sex offenders by the Department of Corrections. See 2006 PA 165 through 172. Defendant argues that reading these provisions together, MCL 750.520n controls over MCL 750.520b(2)(d) so that lifetime electronic

[3] By "tie-barring" the acts, the Legislature ensured that none of the acts could take effect unless all of the other specified acts were also enacted.

monitoring does not apply to persons convicted of CSC-I unless the victim was under 13 years of age. The prosecution argues that lifetime electronic monitoring applies to all persons convicted of CSC-I regardless of the victim's age, i.e., the age of the victim is pertinent only to persons convicted of second-degree criminal sexual conduct (CSC-II), MCL 750.520c. This Court agreed with the prosecution's position in *Brantley*, 296 Mich App at 559, holding "that any defendant convicted of CSC-I under MCL 750.520b, regardless of the age of the defendant or the age of the victim, must be ordered to submit to lifetime electronic monitoring." Dissenting in *Brantley*, Judge K. F. KELLY found persuasive several unpublished opinions of this Court that agreed with defendant's position. *Id*. at 564-567 (K. F. KELLY, J., dissenting), citing *People v Bowman*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2010 (Docket No. 292415), lv den 489 Mich 898 (2011); *People v Quintana*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket No. 295324), lv den 490 Mich 894 (2011); *People v Floyd*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2011 (Docket No. 297393), lv den 491 Mich 886 (2012); and *People v Hampton*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2011 (Docket No. 297224). But for MCR 7.215(J)(1), which requires that we follow *Brantley*, we would vacate the order for lifetime electronic monitoring.

A. STANDARD OF REVIEW

Defendant failed to object to the imposition of lifetime electronic monitoring in the trial court; therefore, he failed to preserve this issue for appeal. We review an unpreserved claim for plain error affecting substantial rights. *Carines*, 460 Mich at 763. In this case, defendant

raises an issue involving the interpretation and application of a statute, which this Court reviews de novo. *People v Kern*, 288 Mich App 513, 516; 794 NW2d 362 (2010).

B. PERTINENT STATUTES

The Penal Code, for purposes of the chapter concerning criminal sexual conduct, defines "electronic monitoring" to mean "that term as defined in section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285." MCL 750.520a(c) as added by 2006 PA 171.

MCL 791.285 provides, pertinent to the issue in this case:

> (1) The lifetime electronic monitoring program is established in the department [of Corrections]. The lifetime electronic monitoring program shall implement a system of monitoring individuals released from parole, prison, or both parole and prison who are sentenced by the court to lifetime electronic monitoring. . . .
>
> * * *
>
> (3) As used in this section, "electronic monitoring" means a device by which, through global positioning system satellite or other means, an individual's movement and location are tracked and recorded.

MCL 750.520b(1) sets forth various forms of CSC-I that are punishable, as follows, under MCL 750.520b(2):

> (a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.
>
> (b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.
>
> * * *

> (d) In addition to any other penalty imposed under subdivision (a) or (b), the court *shall* sentence the defendant to lifetime electronic monitoring *under section 520n*. [Emphasis added.]

CSC-II is punishable by not more than 15 years' imprisonment. MCL 750.520c(2)(a). "In addition to the penalty specified in subdivision (a), the court shall sentence the defendant to lifetime electronic monitoring under section 520n *if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age*." MCL 750.520c(2)(b) (emphasis added).

Finally, and critical to this issue, MCL 750.520n(1) provides:

> A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285.

C. ANALYSIS

This Court's primary obligation when it interprets a statute is to ascertain and give effect to the intent of the Legislature. *People v Breidenbach*, 489 Mich 1, 8; 798 NW2d 738 (2011). The best way of determining the Legislature's intent is through the plain words used in the statute, read in context according to their ordinary meaning to provide a harmonious meaning to the whole statute. *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). "If the statutory language is unambiguous, no further judicial construction is required or permitted because we presume the Legislature intended the meaning that it plainly expressed." *Id*. "A statutory provision is ambiguous if it irreconcilably conflicts with

another provision or is equally susceptible to more than one meaning." *Kern*, 288 Mich App at 517, citing *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008).

In *Kern*, this Court examined the interplay between MCL 750.520c, MCL 750.520n, and MCL 791.285 as they related to lifetime electronic monitoring of persons convicted of CSC-II but not sentenced to prison. The Court held that the defendant, "who was sentenced to five years' probation, with 365 days to be served in jail, is not subject to lifetime electronic monitoring." *Kern*, 288 Mich App at 525. In conducting its statutory analysis, the *Kern* Court noted the statutes relating to lifetime electronic monitoring were *in pari materia*, opining:

> In general, [s]tatutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole. No one provision may be viewed in a vacuum. The object of the [*in pari materia*] rule is to give effect to the legislative purpose as found in harmonious statutes. [*Id*. at 517 (citations and quotation marks omitted; first alteration in original).]

Defendant argues that although nothing in § 520b limits the mandatory lifetime electronic monitoring of those convicted of CSC-I by the age of the victim, MCL 750.520b(2)(d) specifically requires that the sentence of lifetime electronic monitoring be imposed "*under section 520n*." Defendant reads MCL 750.520n(1) as applying victim age limitations for the imposition of lifetime electronic monitoring to convictions under both § 520b and § 520c. Defendant relies on the unpublished opinions of this Court. He also cites Department of Corrections Policy Directive 6.04.100, but this directive merely restates MCL 750.520n(1).

The prosecution argues that the plain language of MCL 750.520b(2)(d) requires that trial courts "shall

sentence" all persons convicted of CSC-I, regardless of the victim's age, to lifetime electronic monitoring. It argues that MCL 750.520n must be read in the context of § 520b, for which the Legislature provided no victim age limits for lifetime electronic monitoring, and § 520c, in which the Legislature imposed the same victim age limits for lifetime electronic monitoring as stated in § 520n. Read in this context, § 520n requires lifetime electronic monitoring for defendants convicted of violating § 520b *or* defendants 17 years old or older who are convicted of violating § 520c with respect to victims less than 13 years of age.

The prosecution and defendant's interpretations of § 520b and § 520n are equally reasonable. Consequently, when we read these statutory provisions together, as we must, we conclude they are ambiguous because they are "equally susceptible to more than one meaning." *Kern*, 288 Mich App at 517. "[A] statute that is unambiguous on its face can be 'rendered ambiguous by its interaction with and its relation to other statutes.' " *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997) (citations and quotation marks omitted). In this case, the apparently plain language of MCL 750.520b(2)(d) is rendered ambiguous by the conflicting language in MCL 750.520n(1), to which it refers, and judicial construction of the statutes is necessary.

There are rules of statutory construction that favor the prosecution's reading of the statutes. See *Brantley*, 296 Mich App at 557-558. Most notably, " 'Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute . . . .' " *People v Anstey*, 476 Mich 436, 444; 719 NW2d 579 (2006), quoting *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006) (citation and quotation marks omitted). Here, the Legislature

specifically applied victim age limits on the imposition of lifetime electronic monitoring in § 520c and with respect to the mandatory minimum sentences in § 520b(2)(b) and (c), but imposed no such limitation in § 520b(2)(d). Additionally, the last antecedent rule could support the prosecution's construction of § 520n(1). "Generally, a modifying clause will be construed to modify only the last antecedent, unless something in the subject matter or dominant purpose requires a different interpretation." *People v Henderson*, 282 Mich App 307, 328; 765 NW2d 619 (2009).

Despite these rules of statutory construction, we believe it more appropriate to focus on the language that the Legislature chose to include in MCL 750.520b(2)(d), rather than assume intentional omissions. Specifically, although it need not have, the Legislature required that trial courts in sentencing CSC-I offenders to lifetime electronic monitoring do so "under section 520n." That section, as defendant argues, and as numerous judges of this Court have concluded, can reasonably be read as limiting lifetime electronic monitoring of a person convicted of either CSC-I or CSC-II to when the victim was under age 13. We conclude this construction is the more reasonable one consistent with the Legislature's mandate for construing the Penal Code. "All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law." MCL 750.2; see also *Kern*, 288 Mich App at 517. We also conclude this construction is consistent with the dominant purpose of the Legislature when it enacted the statutory scheme for lifetime electronic monitoring: to protect children that are the most vulnerable to sexual predators—children under the age of 13. As such, this interpretation of the statute is also consistent with the last antecedent rule. *Henderson*, 282 Mich App at 328.

For these reasons, we agree with Judge KELLY's analysis of this issue in her dissent in *Brantley* and with the per curiam analyses in the several unpublished opinions of this Court addressing this issue. While these opinions are not binding precedent, MCR 7.215(C)(1), we find them instructive and persuasive. *People v Jamison*, 292 Mich App 440, 445; 807 NW2d 427 (2011).

III. CONCLUSION

The evidentiary errors that defendant has raised on appeal are not of constitutional magnitude. With respect to the exclusion of evidence of purported other acts regarding the victim's mother and her daughters, we conclude that the trial court did not abuse its discretion. With respect to the trial court's exclusion of character evidence offered by defendant under MRE 404(a)(1), we conclude the trial court abused its discretion but that the error was not outcome determinative and does not warrant reversal. *Lukity*, 460 Mich at 495-496. Finally, we follow *Brantley* on the issue of lifetime electronic monitoring only because we are required to do so. MCR 7.215(J)(1).

We affirm defendant's convictions and sentences.

METER, P.J., concurred with MARKEY, J.

FITZGERALD, J. (*concurring in part and dissenting in part*). I respectfully disagree with the majority's conclusion that lifetime electronic monitoring does not apply to persons convicted of CSC-I unless the victim was under 13 years of age.

The CSC-I statute provides in MCL 750.520b(2)(d) that "[i]n addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n." The

CSC-II statute provides in MCL 750.520c(2)(b) that "[i]n addition to the penalty specified in subdivision (a), the court shall sentence the defendant to lifetime electronic monitoring under section 520n *if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age.*" (Emphasis added.) MCL 750.520n(1) then provides that a "person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring . . . ."

Clearly, the CSC-II statute provides for lifetime electronic monitoring under § 520n only if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age. The CSC-I statute clearly does not contain age limitations but, rather, provides that the court shall sentence the defendant to lifetime electronic monitoring under § 520n. Accordingly, it appears clear that, within the text of MCL 750.520n(1), the phrase "for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age" modifies § 520c only. I therefore agree with the analysis set forth in *People v Brantley*, 296 Mich App 546; 823 NW2d 290 (2012), and would hold that "any defendant convicted of CSC-I under MCL 750.520b, regardless of the age of the defendant or the age of the victim, must be ordered to submit to lifetime electronic monitoring." *Id.* at 559. Consequently, I also disagree with the majority's request that a conflict panel be convened pursuant to MCR 7.215(J)(2) and (3). In all other respects, I concur with the majority opinion.

AFSCME LOCAL 25 v WAYNE COUNTY

Docket Nos. 306414 and 306415. Submitted April 11, 2012, at Detroit. Decided August 2, 2012, at 9:00 a.m. Application for leave to appeal dismissed on stipulation, 493 Mich 899.

Locals 25, 101, 409, and 1659 of the American Federation of State, County and Municipal Employees (AFSCME) brought an action in the Wayne Circuit Court alleging that Wayne County and its chief executive officer (CEO) had violated the Wayne County Charter and engaged in improper collective-bargaining practices by unilaterally implementing the terms of its last best offer after negotiations to reach a successor collective-bargaining agreement reached an impasse. The last best offer, which required union employees to accept a 20-percent wage decrease, was issued through the Wayne County labor relations division under the authority of the CEO, and had been neither submitted to nor approved by the Wayne County Commission. Wayne County filed a counterclaim for a declaratory judgment and injunctive relief, and Michigan AFSCME Council 25 successfully moved to intervene as a plaintiff. The court, John A. Murphy, J., granted defendants summary disposition of plaintiffs' claims for lack of jurisdiction and granted partial summary disposition in favor of intervening plaintiff Council 25, ruling that under the Wayne County Charter and ordinances, the rate of compensation for county employees must be approved by the Wayne County Commission. Defendants moved for reconsideration or, alternatively, for a stay of proceedings pending appeal, arguing for the first time that they were immune from suit pursuant to the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. The trial court denied defendants' motion and request for a stay, and defendants appealed this order as of right in Docket No. 306414. The Court of Appeals granted defendants' application for leave to appeal the trial court's opinion and order granting partial summary disposition in favor of intervening plaintiff in Docket No. 306415 and consolidated the cases.

The Court of Appeals *held*:

1. Public employment labor relations are governed by the public employment relations act (PERA), MCL 423.201 *et seq*. Following the expiration of a collective-bargaining agreement, PERA requires that a public employer bargain collectively and in

good faith with respect to wages, hours, and other terms and conditions of employment that are mandatory subjects of bargaining. These subjects survive the expiration of an agreement by operation of law until an impasse in negotiation occurs. Consequently, before an impasse is reached, neither party may take unilateral action with respect to a mandatory subject of bargaining. The primary obligation of the parties when negotiating a collective-bargaining agreement is to meet and confer in good faith by manifesting an attitude and conduct that will be conducive to reaching an agreement. If the parties have negotiated in good faith regarding mandatory subjects of bargaining, their duty under PERA has been met.

2. The authority to unilaterally implement the last best offer when negotiations have reached an impasse is intrinsic to the duty to collectively bargain in good faith and is part of the negotiation process itself. Accordingly, because § 4.323 of the Wayne County Charter required the labor relations division to act for the county under the direction of the CEO in the negotiation and administration of collective-bargaining contracts, commission approval to implement the last best offer was not required.

3. Commission approval to implement the last best offer was not required under Wayne County Ordinance 90-847, § 3, which requires notice, a public hearing, and commission approval before the commission adopts a rule. Although § 7 of the ordinance provides that certain commission actions affecting the compensation of county officers and employees must fully comply with the commission-approval requirements of § 3, § 7 pertains to internal agency procedures and is inapplicable to collective bargaining and negotiations, a matter that § 4.323 of the Wayne County Charter imparted exclusively to the labor relations division under the direction of the CEO. Because Ordinance 90-847 does not apply to the collective-bargaining process, the trial court erred by granting partial summary disposition for Council 25 on that ground, and defendants were entitled to summary disposition in their favor.

4. Once a successor collective-bargaining agreement was reached and before it took effect, the commission had the authority to approve county-employee salaries under MCL 46.11(g), which provides that a county board of commissioners, at a lawfully held meeting, may prescribe and fix the salaries and compensation of county employees if not fixed by law. Given that the parties used the process set forth in this provision when a successor agreement was reached, the commission ultimately had the opportunity to ratify the agreement, which it did before the agreement took effect. The fact that the parties did not employ the procedure

outlined in Ordinance 90-847, § 3 but rather placed the successor agreement on the commission's agenda to ratify confirmed the conclusion that Ordinance 90-847 was inapplicable.

Reversed and remanded for entry of summary disposition in defendants' favor.

M. J. KELLY, P.J., dissenting, would have affirmed, stating that PERA does not limit a local government's authority to regulate its negotiators' use of the last-best-offer tactic and that the Court should defer to Wayne County's policy determination that its public employees should not have their compensation and benefits reduced without the commission's approval. He would have further held that the trial court did not err by determining that the unions' employees were entitled to restitution for the amount of pay and benefits that they had earned under the terms of their interim contract that was unlawfully withheld.

1. LABOR RELATIONS — PUBLIC EMPLOYMENT RELATIONS ACT — COLLECTIVE-BARGAINING AGREEMENTS.

Public employment labor relations are governed by the public employment relations act (PERA), MCL 423.201 *et seq*.; following the expiration of a collective-bargaining agreement, PERA requires that a public employer bargain collectively and in good faith with respect to wages, hours, and other terms and conditions of employment that are mandatory subjects of bargaining; the primary obligation of the parties when negotiating a collective-bargaining agreement is to meet and confer in good faith by manifesting an attitude and conduct that will be conducive to reaching an agreement; if the parties have negotiated in good faith regarding mandatory subjects of bargaining, their duty under PERA has been met.

2. LABOR RELATIONS — PUBLIC EMPLOYMENT RELATIONS ACT — COLLECTIVE-BARGAINING AGREEMENTS — IMPASSES IN COLLECTIVE BARGAINING — UNILATERAL IMPLEMENTATIONS OF LAST BEST OFFER.

Mandatory subjects of collective bargaining survive the expiration of a collective-bargaining agreement by operation of law until an impasse in negotiation occurs; before an impasse is reached, neither party may take unilateral action with respect to a mandatory subject of bargaining; the authority to unilaterally implement the last best offer when negotiations have reached an impasse is intrinsic to the duty to collectively bargain in good faith and is part of the negotiation process itself.

Law Office of Eric I. Frankie PLC (by *Eric I. Frankie*) and *Miller Cohen, P.L.C.* (by *Richard G. Mack, Jr.*, *Ada Verloren*, and *Austin W. Garrett*), for Michigan AFSCME Council 25.

Bruce A. Campbell, Assistant Corporation Counsel, and *Clark Hill PLC* (by *Thomas M. J. Hathaway*, *Jeffrey A. Steele*, and *David A. Hardesty*) for Wayne County and the Wayne County Chief Executive Officer.

Before: M. J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

DONOFRIO, J. Defendants, Wayne County (or the county) and the Wayne County Chief Executive Officer (the CEO), appeal both as of right and by leave granted the trial court's orders granting partial summary disposition in favor of intervening plaintiff, Michigan AFSCME Council 25, on its claim that defendants unlawfully imposed a wage reduction for county employees, and denying defendants' motion for reconsideration regarding the applicability of governmental immunity. Because defendants were not required to obtain approval from the Wayne County Commission before implementing the terms of the "last best offer," we reverse and remand for entry of summary disposition in defendants' favor.

Plaintiffs (four AFSCME local unions) and defendants were parties to a collective-bargaining agreement (CBA). After the CBA expired, the parties unsuccessfully engaged in negotiations to reach a successor agreement. On October 21, 2010, plaintiffs filed this action, alleging that defendants were in violation of the Wayne County charter and had engaged in improper collective-bargaining practices. In a December 1, 2010, letter to plaintiffs, Mark Dukes, director of Wayne

County's labor relations division, declared that negotiations had reached an impasse and indicated that the county would be implementing the terms of its "last best offer" (LBO), which required union employees to accept a 20-percent wage decrease and other concessions. The LBO was issued through the labor relations division, under the authority of the CEO, and was not submitted to or approved by the Wayne County Commission. The county filed a counterclaim for a declaratory judgment and injunctive relief. The trial court granted the motion to intervene of Council 25. Like plaintiffs, Council 25 alleged that the CEO violated Wayne County ordinances by imposing the wage decrease without commission approval.

The trial court granted defendants summary disposition of plaintiffs' claims for lack of jurisdiction[1] and, with respect to intervening plaintiff Council 25, the court granted partial summary disposition in its favor regarding the CEO's failure to obtain commission approval for the wage decrease. The trial court's order invalidated the CEO's imposition of the LBO because it fixed the rates of compensation for county employees without the commission's approval. The court stated that the "matter will proceed on the issue of damages." The court specifically "declare[d] that under the Wayne County Charter and ordinances, to be lawful, any mandate that fixes the rate of compensation for county employees . . . must have the approval of the Wayne County Commission."

Defendants moved for reconsideration or, alternatively, for a stay of proceedings pending appeal, arguing

[1] The trial court determined that jurisdiction was proper in the Michigan Employment Relations Commission. That ruling pertained to plaintiffs only, not to intervening plaintiff Council 25, and it is not at issue in this appeal.

for the first time that they were immune from suit pursuant to the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, for violations of a county ordinance. Defendants contended that the trial court therefore erred by granting partial summary disposition in favor of Council 25. The trial court denied defendants' motion and request for a stay. Defendants now appeal in this Court.

"This Court reviews de novo a trial court's grant or denial of a motion for summary disposition." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). Summary disposition under subrule (C)(8) is appropriate when a claim "is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id*.

Public employment labor relations are governed by the public employment relations act (PERA), MCL 423.201 *et seq.* The underlying purpose of PERA "is to resolve labor-management strife through collective bargaining." *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 28-29; 753 NW2d 579 (2008) (quotation marks and citation omitted). Following the expiration of a CBA, PERA requires that a public employer bargain collectively and in good faith with respect to wages, hours, and other terms and conditions of employment that are "mandatory subjects of bargaining . . . ." *Jackson Community College Classified & Technical Ass'n, MESPA v Jackson Community College*, 187 Mich App 708, 711-712; 468 NW2d 61 (1991) (quotation marks and citation omitted). These subjects "survive the expiration of an agreement by operation of law until

an impasse in negotiation occurs." *Id*. at 712. Consequently, "[b]efore an impasse in the bargaining process is reached, neither party may take unilateral action with respect to a mandatory subject of bargaining . . . ." *Id*.

Section 15 of PERA, MCL 423.215(1), provides:

> A public employer shall bargain collectively with the representatives of its employees as described in [MCL 423.211] and may make and enter into collective bargaining agreements with those representatives. Except as otherwise provided in this section, for the purposes of this section, to bargain collectively is to perform the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or to negotiate an agreement, or any question arising under the agreement, and to execute a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or make a concession.

In construing this provision, our Supreme Court has recognized:

> The primary obligation placed upon the parties in a collective bargaining setting is to meet and confer in good faith. . . . The law does not mandate that the parties ultimately reach agreement, nor does it dictate the substance of the terms on which the parties must bargain. In essence the requirements of good faith bargaining is [sic] simply that the parties manifest . . . an attitude and conduct that will be conducive to reaching an agreement. [*Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 53-54; 214 NW2d 803 (1974).]

If the parties have negotiated in good faith regarding mandatory subjects of bargaining, their statutory duty under PERA has been met. *Id.* at 55.

Intrinsic to the duty to collectively bargain in good faith is the authority to unilaterally implement an LBO when negotiations have reached an impasse. The parties here do not dispute this authority, which is a product of the evolution of the common law as it pertains to collective bargaining.[2] See *Detroit Police Officers Ass'n*, 391 Mich at 56; *AFSCME Council 25 v Wayne Co*, 152 Mich App 87, 93-94, 97; 393 NW2d 889 (1986). Council 25 argues, however, that because the LBO in this case affected wages and benefits, commission approval was required before the terms of the LBO could be implemented. This argument contravenes the notion that the authority to implement an LBO when an impasse is reached *is part of the negotiation process itself*. The United States Supreme Court has recognized that "impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process." *Brown v Pro Football, Inc*, 518 US 231, 239; 116 S Ct 2116; 135 L Ed 2d 521 (1996). Similarly, the authority to unilaterally implement the terms of an LBO following impasse has been characterized as a "bargaining 'tactic[]'. . . utilized in the collective bargaining process." *Brown v Pro Football, Inc*, 50 F3d 1041, 1054 (DC Cir, 1995), aff'd 518 US 231 (1996). Thus, the implementation of an LBO is a continuation of the collective-bargaining process and inherent to the statutory obligation to negotiate in good faith to reach a CBA. Because the authority to implement the LBO was integral to the negotiation process, and § 4.323(b) of the Wayne County Charter required the labor relations division to "act for the County under the direction of the CEO in the negotiation and

[2] With the exception of MCL 423.207a(4), which applies to public school employers, there is no statutory authority granting public employers the right to take unilateral action following a collective-bargaining impasse.

administration of collective bargaining contracts," commission approval was not required before the LBO could be implemented.

In support of its argument that commission approval was required, Council 25 relies on, and the trial court found dispositive, Wayne County Ordinance 90-847,[3] pertaining to the rulemaking authority of county agencies. "The rules of statutory construction apply to ordinances . . . ." *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 244; 704 NW2d 117 (2005). "When interpreting statutory language, the primary goal is to discern and give effect to the legislative intent that may reasonably be inferred from the language of the statute." *Id*. at 243. When language is unambiguous, courts must apply the provision as written. *Id*. We accord words used in a provision their common and ordinary meanings and "must 'give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.' " *Id*. at 244, quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

Ordinance 90-847, § 3(a) provides:

> Subject to county commission approval as hereinafter provided, each county agency shall formulate and promulgate rules to prescribe the organization, procedures and methods by which it serves the public or regulates any public or private activity, process, facility, operation or agency. These rules shall also specify where, when and how a person may obtain information from or submit requests to the agency for service, advice and other assistance.

Ordinance 90-847, § 2, defines "rule" as follows:

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[3] The provisions contained in Ordinance 90-847 are also found in Chapter 5 of the Wayne County Code of Ordinances.

> *Rule* means a directive, statement, standard, policy, regulation, proclamation, ruling, determination, order, instruction or interpretation, which is of general effect and future application, which applies, implements or makes more specific those express laws enforced, implemented or administered by an officer or agency, or which prescribes the organization, procedure or practice of that office or agency, including the amendment, suspension or rescission thereof.

Ordinance 90-847, § 3, sets forth requirements that must be met before an agency adopts a rule, including:

> (f) Before adopting a rule, an agency shall give notice of a public hearing and offer any person a reasonable opportunity to present data, views and arguments pertaining to it. Unless otherwise provided by law, the notice shall be given at least ten days before the hearing and at least 20 days before adoption of the rule. The notice shall include all of the following:
>
> (1) An exact reference to the statutory, charter or ordinance authority under which the rule is made.
>
> (2) A concise summary of the key terms of the rule, and its proposed effective date.
>
> (3) The time and place of the public hearing, and how, where and when data and viewpoints may be submitted to the agency other than at the hearing.
>
> (g) Before setting a public hearing on a proposed rule, agencies subject to supervision of the chief executive officer shall also obtain his or her approval. All county agencies shall provide a copy of a proposed rule to the corporation counsel, who shall rule on the legality and liability potential of the proposed rule. The legislative research bureau shall advise the agency as to matters of form, citation, classification, arrangement, numbering, cross-reference, textual clarity and the need or not for county commission approval.
>
> (h) Each agency shall keep a mailing list of persons who ask notice of proposed rules. A renewal card shall be sent to

each person each January to update and purge the list. Notice shall be mailed first class to all listed persons as to each pertinent public hearing.

(i) The agency shall publish the notice of public hearing as required by law or ordinance, and if none, then in a manner best calculated to give notice to those persons likely to be affected by the proposed rule, such as: a newspaper of general circulation, or a trade journal, or neighborhood newsletters, depending on circumstances.

* * *

(k) An agency shall submit the proposed rule, revised when appropriate due to the public hearing, to the county commission by delivering six copies to the clerk thereof. The chairman shall refer the proposed rule to the most appropriate standing committee or committees for prompt consideration. The clerk shall retain one copy for commission files, and post one copy on a common bulletin board to which other commissioners may refer. The proposed rule shall be considered by the committee to which transmitted within 15 days. If approved by all committee members, it shall be deemed approved by the commission, and so certified by the clerk to the issuing agency. If not approved, the proposed rule shall be forwarded to and scheduled for full board action within 30 days of receipt. If not rejected within 30 days of receipt, a rule is effective.

* * *

(o) A rule shall not be valid and enforceable unless processed in substantial compliance with the notice requirements of this chapter. Failure, however, to give a person notice of a proposed rule shall not invalidate the rule if those persons who are in fact notified are reasonably representative of the interests and viewpoints of the classes affected by the rule.

Ordinance 90-847, § 6, exempts certain rules from the requirements of notice and commission approval, including "[a] determination, decision, order or opinion in

a case," "[a] declaratory ruling or opinion as applied to a fixed and stated set of facts," and "[a]n individual decision by an agency to exercise or not to exercise a legal power, although private rights and interests are affected by that decision." The exemptions in § 6, however, are subject to Ordinance 90-847, § 7, which provides, in pertinent part:

> A memorandum, directive, order or determination *which governs the internal management, organization or procedures of an agency*, but which also addresses or substantially impacts upon the following matters, shall not be valid and of effect unless in full compliance with the commission approval requirements of this chapter:
>
> (1) Fix the rate of compensation for county officers and employees, including fringe benefits, per diem rates and lump sum payments in lieu of reimbursed expenses, where these rates are not otherwise fixed by contract or law. [Emphasis added.]

Council 25 principally relies on Ordinance 90-847, § 7, and contends that commission approval before implementation of the LBO was required because the LBO affected county employees' rates of compensation and benefits. The plain language of § 7, however, pertains to "the internal management, organization or procedures of an agency[.]" Moreover, as is readily apparent from the other quoted provisions of Ordinance 90-847, the ordinance involves agency rulemaking and is wholly inapplicable to collective bargaining and negotiations, a matter that § 4.323 of the Wayne County Charter imparted to the labor relations division, under the direction of the CEO. Because Ordinance 90-847 does not apply to the collective-bargaining process, the trial court erred by relying on the ordinance and granting partial summary disposition for Council 25. As previously discussed, the labor relations division, under the CEO's direction, was authorized to implement the

LBO as part of the negotiation process in an effort to reach a successor CBA. Accordingly, defendants were entitled to summary disposition in their favor.

Further, we note that MCL 46.11(g) empowered the commission to approve county employee salaries once a successor CBA was reached. That provision states:

> A county board of commissioners, at a lawfully held meeting, may do 1 or more of the following:
>
> * * *
>
> (g) Prescribe and fix the salaries and compensation of employees of the county if not fixed by law . . . .

Under this provision, once negotiations resulted in a successor CBA, the commission had the authority to approve employee salaries before the new CBA took effect. The parties indicated at oral argument that this process is the one that was actually used when plaintiffs and defendants reached a successor CBA at year's end 2011. Thus, the commission ultimately had the opportunity to ratify the successor CBA, including approving employee salaries, and did so before the CBA took effect. Notably, the procedure outlined in Ordinance 90-847, § 3, was not employed when the parties reached a successor CBA. Rather, the CBA was placed on the commission's agenda and simply ratified. The process that was used confirms our conclusion that Ordinance 90-847 is inapplicable in these circumstances. Moreover, application of the ordinance in these circumstances would conflict with the Wayne County Charter because it would infringe on the exclusive authority conferred on the executive to negotiate CBAs. See Wayne County Charter, § 4.323. To accept the interpretation of Council 25 would require the legislative branch, the commission, to intrude into the negotiation

process, exclusively granted to the executive, rather than to perform its overseeing function in ratifying or rejecting the CBA upon its submission.

Having determined that the trial court erred by denying summary disposition for defendants, we need not address defendants' argument that governmental immunity precluded plaintiffs from proceeding on the issue of damages.

Reversed and remanded for entry of summary disposition in defendants' favor. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

FITZGERALD, J., concurred with DONOFRIO, J.

M. J. KELLY, P.J. (*dissenting*). After examining the relevant provisions of the public employment relations act, MCL 423.201 *et seq.*, I conclude that the act cannot be read to include a codification of the negotiating tactic referred to as the last-best-offer rule. It also cannot be read to limit a local government's authority to regulate its negotiator's use of the last-best-offer tactic. Instead, whether and to what extent a negotiator may employ the last-best-offer tactic is—unless used in bad faith—a matter of local concern that may be governed by local law. Under local law, defendant Wayne County's Chief Executive Officer (the Executive) had the authority to negotiate collective-bargaining agreements with plaintiffs—four locals and Council 25 of the American Federation of State, County and Municipal Employees (collectively the Unions)—which necessarily included the authority to use the last-best-offer tactic. But local law also limits that authority: the Executive may not use the tactic if it would result in lower benefits for the employees without first obtaining approval from defen-

dant Wayne County—specifically the Wayne County Commission (the Commission). Because the Executive did not obtain the Commission's approval before using the last-best-offer tactic to reduce the employees' benefits, the trial court correctly determined that those terms were unlawful and invalid. Further, I reject defendants' contention that they cannot be compelled to restore the unlawfully withheld pay and benefits because they have governmental immunity. Because I would affirm the trial court on these bases, I must respectfully dissent.

I. MOTION FOR SUMMARY DISPOSITION

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition as well as the proper interpretation and application of statutes. *Chen v Wayne State Univ*, 284 Mich App 172, 191, 200; 771 NW2d 820 (2009).

B. OBLIGATION TO BARGAIN IN GOOD FAITH

The majority argues that the use of the last-best-offer tactic is integral to the bargaining process and "inherent to the statutory obligation to negotiate in good faith . . . ." *Ante* at 496. The majority asserts that, because "the authority to implement the [last best offer] was integral to the negotiation process, . . . commission approval was not required before the [offer] could be implemented." *Ante* at 496-497. Although its analysis is not entirely clear, the majority has apparently interpreted the statutory duty to bargain in good faith as an inherent limitation on the authority of local governments to regulate their own conduct during negotiations. To the extent that the majority's opinion can be read to stand for that proposition, it has no basis

in the statutory language and, therefore, amounts to a judicially created rule that usurps the power of local governments to regulate their own conduct.

The public employment relations act provides, in relevant part, that a "public employer shall bargain collectively with the representatives of its employees . . . ." MCL 423.215(1). Further, the duty to bargain collectively is a "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." *Id.* However, the obligation to bargain in good faith "does not compel either party to agree to a proposal or make a concession." *Id.* Notably, this statute does not delineate the types of tactics that may be used during negotiations—it merely mandates that the bargaining be in good faith, whatever the tactics. See *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54; 214 NW2d 803 (1974) (stating that the essential requirement of good-faith bargaining is simply that the parties manifest an attitude and conduct that are conducive to reaching an agreement). Similarly, the statute imposes the obligation to bargain in good faith on the "public employer," but does not propose to identify or limit the authority of local governments to select individuals or entities to bargain on their behalf and does not require local governments to give unfettered authority to their representatives to use whatever tactics the representative might wish to use, as long as those tactics are consistent with good-faith bargaining. The statute is quite limited in application and accordingly cannot be understood to deprive local governments of the ability to specify whether, when, or how specific bargaining tactics may be used. See *Local 1277, Metro Council No 23, AFSCME v City of Center Line*, 414 Mich 642, 651; 327 NW2d 822 (1982) (stating that

the statute is procedural in nature and requires the parties to " 'confer in good faith with an open mind and a sincere desire to reach an agreement' ") (citation omitted).

Our Supreme Court has recognized that after the parties to a good-faith bargain reach an impasse, a public employer may take unilateral action on a disputed issue if that action "is consistent with the terms of its final offer to the union." *Detroit Police Officers Ass'n*, 391 Mich at 56. And it has been held that the use of the last-best-offer tactic after an impasse is a part of the negotiating process. *Brown v Pro Football, Inc*, 518 US 231, 239; 116 S Ct 2116; 135 L Ed 2d 521 (1996). It is, therefore, permissible to use this tactic. See *Detroit Police Officers Ass'n*, 391 Mich at 63. But the Legislature did not *require* the use of this tactic. Stated another way, a public employer does not necessarily breach its duty to negotiate in good faith simply because it uses the last-best-offer tactic. Similarly, a public employer may legitimately conclude that it is not in its own best interest to use this tactic and, in lieu of its use, continue to operate under an expired bargaining agreement without breaching its duty to negotiate in good faith. Consequently, MCL 423.215(1) does not prevent a local government from directly or indirectly limiting its own negotiator's use of the last-best-offer tactic, and the majority errs to the extent that it concludes otherwise.

C. LOCAL LAW AND THE LAST-BEST-OFFER TACTIC

The majority also argues that Wayne County's local laws do not require the Executive to obtain the Commission's approval before using the last-best-offer tactic, even when the use of that tactic reduces the public employees' wages. I cannot agree.

Wayne County's charter establishes a personnel department with a labor relations division. See Wayne County Charter, §§ 4.321 and 4.323. The charter also provides that the labor relations division has the responsibility to "act for the County under the direction of the [Executive] in the negotiation and administration of collective bargaining contracts." Id. at § 4.323(b). Thus, under the charter, the Executive has the general authority to direct the negotiations conducted by the labor relations division. Nevertheless, the Executive's power to direct the labor relations division is not unlimited; the Executive is empowered to "[s]upervise, coordinate, direct, and control all county facilities, operations, and functions *except as otherwise provided by law or this Charter*[.]" *Id*. at § 4.112(a)(1) (emphasis added). Accordingly, the Executive's authority to direct the labor relations division does not include the authority to direct the labor relations division to violate Wayne County's ordinances or charter. As a result, the relevant question is whether Wayne County's ordinances require the Executive—acting through the labor relations division—to obtain approval before implementing the last-best-offer tactic.

Wayne County's charter provides that the Commission is the county's legislative body, *id*. at § 3.111, and that the Commission must exercise its powers by ordinance or resolution, *id*. at § 3.115. The charter also grants the Commission the power to approve all contracts made by the county. *Id*. at § 3.115(3). And the Commission has expressly reserved that right by ordinance with respect to collective-bargaining agreements. Wayne County Code, § 120-121(c).[1] However, the use of the last-best-offer tactic does not result in the creation

[1] I shall refer to the ordinances using their codification in the Wayne County Code of Ordinances rather than the numbers assigned at their

of a collective-bargaining agreement because it does not amount to a meeting of the minds. See *Port Huron Ed Ass'n MEA/NEA v Port Huron Area Sch Dist*, 452 Mich 309, 326-327; 550 NW2d 228 (1996) (noting that there must be a meeting of the minds in order to form a contract and stating that a collective-bargaining agreement, like any other contract, is the product of mutual assent); but see *McNealy v Caterpillar, Inc*, 139 F3d 1113, 1121-1122 (CA 7, 1998) (stating that unilateral implementation of the last-best-offer tactic amounts to an offer for an interim agreement, which can be accepted by the workers returning to work during the period of continuing negotiations). Hence, the provisions applicable to completed contracts do not compel the Executive to seek the Commission's approval before using the last-best-offer tactic.

Nevertheless, the Unions argued that the Wayne County ordinances governing its agencies' rulemaking authority plainly apply to the Executive's use of the last-best-offer tactic. See Wayne County Code, Ch 5. The trial court agreed and determined that § 5-6(1) of the Code applied to the Executive's use of the last-best-offer tactic. For that reason, it concluded that the Executive had to obtain the Commission's approval before its use could become "valid and of effect."

The majority, in contrast, concludes that § 5-6 does not apply to the use of the last-best-offer tactic. Although the majority quotes the relevant ordinances, it offers very little interpretive analysis; rather, it summarily concludes that, given the overall provisions of the ordinances governing administrative procedures, "the ordinance involves agency rulemaking and is

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adoption. The chief ordinance at issue in this case, which the majority and the parties refer to as 90-847, was codified at §§ 5-1 through 5-6 of the Wayne County Code (the Code).

wholly inapplicable to collective bargaining and negotiations . . . ." *Ante* at 500. I cannot agree with this unsupported assertion.

Section 5-6 provides that a "memorandum, directive, order or determination which governs the internal management, organization or procedures of an agency, but which also addresses or substantially impacts upon" certain matters "shall not be valid and of effect unless" it complies with the commission approval requirements stated under chapter 5 of the Wayne County Code. One such matter involves any memorandum, order or determination that fixes the "rate of compensation for county officers and employees, including fringe benefits . . . ." Wayne County Code, § 5-6(1). This ordinance represents a clear policy choice by the local legislature: the Wayne County Commission determined that it is in the best interests of the county to maintain the status quo on the pay and benefits for county employees unless the change is directly approved by the Commission.

Section 5-6 is codified under chapter 5 of the Wayne County Code, which deals generally with administrative rulemaking procedures. This chapter governs the procedures with which an agency must comply in order to validly promulgate "rules" or make "rulings." See Wayne County Code, § 5-2. Section 5-5 provides that certain "rules or rulings" are exempt "from the notice, processing and commission approval requirements" stated under chapter 5, but subject to the exceptions stated under "section 5-6." *Id.* That is, § 5-5 establishes an *exception* to the *exemptions* it provides by reference to § 5-6, but it does not necessarily follow that § 5-6 only applies to rules or rulings. It is noteworthy that the Commission did not refer to the term "rule" within § 5-6. Section 5-1 defines "rule" as

> a directive, statement, standard, policy, regulation, proclamation, ruling, determination, order, instruction or interpretation, which is of general effect and future application, which applies, implements or makes more specific those express laws enforced, implemented or administered by an officer or agency, or which prescribes the organization, procedure or practice of that office or agency, including the amendment, suspension or rescission thereof.

In contrast, § 5-6—on its face—applies generally to all "memoranda, directive[s], orders or determinations" that govern the internal management of an agency. The Commission's decision to refer to these specific categories rather than using the defined terms "rule" or "ruling" must be understood to have been deliberate and must be given effect. See *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980) ("Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible."). That is, § 5-6 must be understood to apply to all memoranda, directives, orders or determinations without regard to whether those memoranda, directives, orders or determinations are also rules or rulings under § 5-1. Hence, I cannot agree with the majority's conclusion that this ordinance does not apply because it only " 'governs the internal management, organization or procedures of an agency . . . ." *Ante* at 500 (emphasis omitted).

Fixing the rate of compensation and benefits for governmental employees implicates the internal management of an agency. Accordingly, the Executive's use of the last-best-offer tactic is a directive or order that governs the internal management of an agency and which—however temporarily—fixes the compensation and benefits for county employees. Consequently, before the Executive could impose the last-best-offer terms on the Unions' employees, it had to obtain the

Commission's approval as provided under § 5-6, which it did not do. For that reason, the Executive's decision to unilaterally lower the county's employees' pay and benefits was void.

II. GOVERNMENTAL IMMUNITY

In their motion for reconsideration of the trial court's order granting summary disposition in favor of the Unions, Wayne County and the Executive argued for the first time that the Unions' claims were barred by governmental immunity. They maintained that the Unions could not seek damages for the pay and benefits that might have been unlawfully withheld because the Unions' claims did not sound in contract and the Unions otherwise failed to plead in avoidance of governmental immunity. Wayne County and the Executive failed to raise this issue in a properly supported motion for summary disposition. As a result, they were not—at that point—entitled to any relief. See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 370; 775 NW2d 618 (2009) (stating that a moving party must make a properly supported motion for summary disposition before the opposing party has any obligation to even respond and, if not properly made, the trial court should not grant relief). And this Court will generally not fault a trial court for refusing to consider a defense that a party raised for the first time in a motion for reconsideration. *Pierron v Pierron*, 282 Mich App 222, 264; 765 NW2d 345 (2009). Nevertheless, even considering this issue on its merits, I do not agree that governmental immunity applies.

In this case, the Unions sued to invalidate the Executive's unilateral decision to alter the terms of employment for the Unions' members. Although the claims alleged that the Executive's decision was unlaw-

ful under an ordinance, the Unions did not premise their request for relief on that ordinance or any tort theory. Rather, the Unions initially asked the trial court to make their members "whole" and in a later complaint asked for any relief that the trial court might conclude was warranted. Because the Executive unlawfully reduced the members' pay and benefits, that reduction was void. Accordingly, the employees were entitled to have the pay and benefits that were unlawfully withheld restored to them—that is, they were entitled to the pay and benefits that they had actually earned for their labors under the interim contractual agreement either until the Commission approved the Executive's change in the benefits and pay or until the parties entered into a new collective-bargaining agreement, whichever came first. Thus, although the Executive's use of the last-best-offer tactic to unlawfully reduce the members' pay and benefits was void under an ordinance, the damages arise from Wayne County's *contractual* obligation to pay its employees under the interim agreement pending a lawful change in the pay and benefits. Because the damages arise from this contractual obligation, Wayne County is not immune from liability. See *Koenig v South Haven*, 460 Mich 667, 675; 597 NW2d 99 (1999).

III. CONCLUSION

The public employment relations act does not limit a local government's authority to regulate its negotiators' use of the last-best-offer tactic. Wayne County has, as a matter of public policy, determined that its public employees should not have their compensation and benefits reduced without the Commission's approval. The trial court respected that policy choice when it determined that the Executive had exceeded the scope

of his authority by cutting the public employees' compensation and benefits without first obtaining approval from the Commission. This Court should respect that policy as well. Finally, the trial court did not err when it determined that the Unions' employees were entitled to restitution for the amount of pay and benefits they had earned under the terms of their interim contract that the Executive unlawfully withheld.

I would affirm.

PEOPLE v CARRIGAN

Docket No. 302090. Submitted July 18, 2012, at Lansing. Decided August 2, 2012, at 9:05 a.m.

Paige C. Carrigan pleaded guilty to breaking and entering a building with the intent to commit a felony, MCL 750.110, malicious destruction of property over $20,000, MCL 750.380(1) and (2)(a), and malicious destruction of property between $1,000 and $20,000, MCL 750.380(1) and (3)(a), after she participated in vandalizing two Mancelona school buildings. The court, Philip E. Rodgers, Jr., J., sentenced defendant to concurrent terms of 24 to 120 months' imprisonment for the first and second convictions and 24 to 60 months' imprisonment for the third conviction. Defendant filed a delayed application for leave to appeal, which the Court of Appeals granted in an unpublished order entered February 24, 2011.

The Court of Appeals *held*:

Under the statutory sentencing guidelines, a trial court must assess 25 points for offense variable (OV) 9 when there were 10 or more victims who were placed in danger of physical injury or death, or 20 or more victims who were placed in danger of property loss. The trial court assessed 25 points for OV 9 in this case asserting that defendant's actions were a crime against the community. The community as a whole suffers from any crime, but it is an indirect victim, and may not be counted as victim for the purposes of OV 9. In this case, only the two schools—each owned by the same district—were direct victims of the crimes; the trial court improperly considered the community members as victims and improperly assessed points under OV 9. Resentencing was required.

Sentences vacated; case remanded for resentencing.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLE 9 — VICTIMS — COMMUNITY MEMBERS.

Under the statutory sentencing guidelines, a trial court must assess 25 points for offense variable (OV) 9 when there were 10 or more victims who were placed in danger of physical injury or death, or 20 or more victims who were placed in danger of property loss; the

> community as a whole suffers from any crime, but it is an indirect victim, and may not be counted as victim for the purposes of OV 9.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Charles H. Koop*, Prosecuting Attorney, for the people.

Sharon D. Jones for defendant.

Before: STEPHENS, P.J., and SAWYER and OWENS, JJ.

PER CURIAM. Defendant appeals by leave granted from her plea-based conviction of one count of breaking and entering a building with intent to commit a felony, MCL 750.110, one count of malicious destruction of property over $20,000, MCL 750.380(1) and (2)(a), and one count of malicious destruction of property between $1,000 and $20,000, MCL 750.380(1) and (3)(a). Defendant was sentenced to concurrent terms of 24 to 120 months' imprisonment for the first and second counts, and 24 to 60 months for the third count. We vacate defendant's sentences and remand for resentencing.

Defendant first argues that the trial court erred by assessing 25 points for offense variable (OV) 9. We agree. "This Court reviews de novo the application of the sentencing guidelines but reviews a trial court's scoring of a sentencing variable for an abuse of discretion." *People v Harverson*, 291 Mich App 171, 179; 804 NW2d 757 (2010). " 'Scoring decisions for which there is any evidence in support will be upheld.' " *Id*. at 179-180, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Under MCL 777.39, a trial court must assess 25 points for OV 9 when "[t]here were 10 or more victims who were placed in danger of physical injury or death, or 20 or more victims who were placed in danger of

property loss[.]" MCL 777.39(1)(b). MCL 777.39(2)(a) further states, "Count each person who was placed in danger of physical injury or loss of life or property as a victim." OV 9 is scored only on the basis of the defendant's conduct during the sentencing offense. *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009). In this case, the trial court assessed 25 points for OV 9 after defendant pleaded guilty to vandalizing two school buildings. The trial court noted that OV 9 should be scored at 25 points because "this really was a crime against a community . . . ."

To determine whether the trial court erred in its scoring of OV 9, we must determine whether each member of the identified "community" can be considered a "person" "placed in danger of property loss" and thus counted as a victim, or whether the "person" placed in danger is limited to the school district itself. In *People v Knowles*, 256 Mich App 53; 662 NW2d 824 (2003), overruled on other grounds by *People v Melton*, 271 Mich App 590 (2006) (conflict panel opinion), this Court considered a related question. In *Knowles*, the defendant stole a check from an acquaintance and received payment on the check from a credit union. *Id*. at 58. The trial court assessed 10 points for OV 9 on the basis of two victims: the defendant's acquaintance and the credit union. *Id*. at 61-62. This Court explained that the trial court properly counted the credit union as a victim because it received financial injury as a direct result of the crime. *Id*. at 62. This Court distinguished "direct" victims, such as the credit union, from "indirect" victims. *Id*. An example of an "indirect" victim was "a health insurer being indirectly harmed by paying for medical treatment resulting from a physical attack on an assault victim." *Id*.

In this case, the community is similar to the "indirect victim" described in *Knowles*. The direct damage occurred to the two schools within the school district, while the community, and the individuals who are members of that community, were harmed as an indirect result of the damage. Under the trial court's broad interpretation, nearly every criminal offense could result in a score of 25 points for OV 9 because the community as a whole always indirectly suffers when a crime is committed. Indeed, it is for this reason that we frequently refer to the prosecutor in a criminal trial as the lawyer for "the people." There is no evidence on the record to establish that 20 or more persons were affected by defendant's vandalism, either directly or indirectly. Rather, the record demonstrates that two schools, each owned by the same school district, suffered property loss. Pursuant to MCL 777.39(1)(d), OV 9 should have been scored at zero points.[1]

"Resentencing is an appropriate remedy where a defendant's sentence is based on an inaccurate calculation of the sentencing guidelines range and, therefore, does not conform to the law." *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008). In this case, the trial court improperly assessed 25 points for OV 9 when no points were warranted. Lowering the total OV points from 41 to 16, the corrected guidelines range would be zero to 17 months, see MCL 777.65, which is an intermediate sanction cell, MCL 769.34(4)(a). Consequently, this matter must be remanded for resentenc-

[1] We note that we need not determine whether the school district was the only victim in this case or whether each of the individual schools can be counted as separate victims. OV 9 provides that if fewer than four victims suffer property loss, zero points are to be assessed. Therefore, even if we were to conclude that the district as a whole and the individual schools all qualified as victims, it would still follow that no points were permitted under OV 9.

ing. Further, because we determine that resentencing is necessary, we need not address whether the trial court's ultimate sentence represents an abuse of discretion.

Vacated and remanded for resentencing. We do not retain jurisdiction.

STEPHENS, P.J., and SAWYER and OWENS, JJ., concurred.

NEAL v DEPARTMENT OF CORRECTIONS

ANDERSON v DEPARTMENT OF CORRECTIONS

Docket Nos. 305142, 305186, 305195, 305225, 305226, and 305288. Submitted April 11, 2012, at Lansing. Decided August 7, 2012, at 9:00 a.m.

Tracy Neal and other female prisoners convicted of felonies and incarcerated in facilities operated by the Department of Corrections (DOC), brought a class action in the Washtenaw Circuit Court (Docket Nos. 305142, 305186, and 305225), and Nicole Anderson and other female prisoners brought a similar action in the Court of Claims (Docket Nos. 305195, 305226, and 305288) against the DOC, past and current DOC directors, and various wardens, as well as corrections officers, alleging that they were the victims of systematic sexual harassment, sexual assault and retaliation inflicted by male corrections personnel. The actions were consolidated below and ultimately resulted in a settlement agreement in which the DOC agreed to pay $100 million in installments over a six-year period into an escrow account, which would then be distributed to the attorneys and class members according to an allocation plan. To prevent retaliation against the class members, the trial court entered a protective order that prohibited the disclosure of the names of class members other than to necessary DOC and Attorney General employees. The Wayne County Prosecutor and the Oakland County Reimbursement Unit/Fiscal Services Division intervened, seeking to discover the names of the class members to ensure that any outstanding orders of restitution, court costs, and court-appointed attorney fees arising from plaintiffs' respective judgments of sentence were paid from the proceeds of the settlement agreement. The Department of Human Services (DHS) intervened to ensure that payment of any outstanding child support obligations were also paid from the proceeds of the settlement agreement before distribution to the plaintiffs in the class action. The court, Timothy P. Connors, J., ordered intervenors to submit a list of the names of any female prisoner with an outstanding obligation who might have been a member of the class. Plaintiffs' counsel was to then compare those lists to the names of class members to determine if any class

member had an outstanding obligation. Intervenors objected, arguing that they needed the list of names of the class members to check that list against their own records. The court declined to order disclosure of the identities of the class members. Intervenors appealed and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. Under MCL 791.220h, if a prisoner is ordered to pay restitution to the victim of a crime and the DOC receives a copy of the restitution order from the court, the DOC must deduct fifty percent of the funds received by the prisoner in a month over $50 for payment of the restitution. Any funds owed by the DOC, or to be paid on behalf of one or more of its employees to satisfy a judgment or settlement to a person for a claim that arose while the person was incarcerated, shall be paid to satisfy any orders of restitution of which the DOC has a record. The DOC has the responsibility to withhold money from the settlement and forward to any victim the restitution that had been ordered, but only if a copy of the restitution order had been sent to the DOC. MCL 791.220h(2) mandates that proceeds from a judgment or a settlement in litigation against the DOC must first be used to satisfy any outstanding restitution order filed with DOC before proceeds may be distributed to a prisoner. The provision of the stipulated protective order that did not allow disclosure of the names of the prisoners involved in the class action to the DOC or its employees was invalid because the DOC has a clear statutory obligation to disburse the funds to the victims in payment of restitution obligations. The parties could not stipulate to an order that relieves the DOC of its statutory obligations or that precludes the DOC from being able to fulfill its statutory obligations.

2. Under MCL 600.5511 any damage award to a prisoner arising out of a claim against the DOC or its employees must first be utilized to pay any outstanding restitution, costs and fees, or other assessments owed to the jurisdiction housing the prisoner. The DOC may not disburse any funds to any plaintiff class member until there has been full payment of all pending restitution orders, costs, and fees as required by MCL 600.5511(2). The DOC must seek to recover any payments to any particular class member if a disbursement was made before all pending restitution orders, costs, and fees were paid and any future payment owed to that particular class member would be inadequate to meet the obligations under the statute. Although MCL 600.5511 was enacted three years after some of the claims in these actions were filed, MCL 600.5511(2) is remedial or procedural in nature and was appropriately applied retroactively because it merely ensured

plaintiffs' payment of their preexisting financial obligations from proceeds to which they had become entitled to receive after the enactment of the statute.

3. Under MCL 552.625a(1), there is an automatic lien on the assets, including settlements and judgments arising from a civil action, of any person obligated to pay child support once that support becomes due and unpaid. The trial court order regarding disclosure of the names of the class members must allow the DHS to effectively collect as much of the support obligation owed by class members as possible from the proceeds of the settlements and to do so before further distribution of the proceeds.

4. Intervenors have no statutory right to know the identity of the class members and the trial court has authority to determine an appropriate method to ensure that the DOC is meeting its statutory obligation under MCL 791.220h and MCL 600.5511 with respect to the proper disbursement of the settlement proceeds.

5. Intervenors' argument that the trial court lacked jurisdiction to issue a protective order because it was by stipulation and not raised by a motion as required by MCR 2.302(C) was not preserved for review because they failed to raise the issue in the trial court.

6. The names of the class members were never a part of the court record. Therefore, MCR 8.119(F), which applies to the requirements for sealing court records, was inapplicable to this case.

7. Any future disbursements under the settlement agreement were stayed until a procedure is in place that will ensure that any outstanding child support, restitution, costs and fees will be collected from the settlement proceeds before the proceeds are disbursed to any class member owing such an obligation.

Affirmed in part, reversed in part, and remanded.

1. SETTLEMENTS — DEPARTMENT OF CORRECTIONS — PRISONERS — DISTRIBUTION OF SETTLEMENT PROCEEDS — RECOVERY OF RESTITUTION BY DEPARTMENT OF CORRECTIONS.

Under MCL 791.220h, if a prisoner is ordered to pay restitution to the victim of a crime and the Department of Corrections (DOC) receives a copy of the restitution order from the court, the DOC must deduct fifty percent of the funds received by the prisoner in a month over $50 for payment of the restitution; any funds owed by the DOC, or to be paid on behalf of one or more of its employees to satisfy a judgment or settlement to a person for a claim that arose while the person was incarcerated, shall be paid to satisfy any orders of restitution imposed on the claimant of which the

DOC has a record; the DOC has the responsibility to withhold money from such a settlement and forward to any victim the restitution that had been ordered, but only if a copy of the restitution order had been sent to the DOC; under MCL 791.220h(2), the proceeds from a judgment or a settlement in litigation against the DOC must first be used to satisfy any outstanding restitution order filed with DOC before proceeds may be distributed to a prisoner.

2. SETTLEMENTS — DEPARTMENT OF CORRECTIONS — PRISONERS — DISTRIBUTION OF SETTLEMENT PROCEEDS — RECOVERY OF RESTITUTION BY DEPARTMENT OF CORRECTIONS.

Under MCL 600.5511, any damage award to a prisoner arising out of a claim against the Department of Corrections (DOC) or its employees must first be utilized to pay any outstanding restitution, costs and fees, or other assessments owed to the jurisdiction housing the prisoner; the Department of Corrections DOC may not disburse any funds to any plaintiff class member until there has been full payment of all pending restitution orders, costs, and fees as required by MCL 600.5511(2); the DOC must seek to recover any payments to any particular class member if a disbursement was made before all pending restitution orders, costs, and fees were paid.

Pitt, McGehee, Palmer, Rivers & Golden, PC (by *Beth M. Rivers, Michael L. Pitt, Peggy Goldberg Pitt,* and *Cary S. McGehee*), *Deborah A. LaBelle, Richard A. Soble*, *Molly H. Reno*, *Patricia Streeter*, and *Ronald J. Reosti* for Tracy Neal, Nicole Anderson, and others.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Joshua S. Smith*, Assistant Attorney General, for the Department of Human Services.

Kym L. Worthy, Prosecuting Attorney, and *Donn Fresard* and *Dana M. Hathaway*, Assistant Prosecuting Attorneys, for the Wayne County Prosecuting Attorney.

Mary Mara, Assistant Corporation Counsel, for the Oakland County Reimbursement Unit.

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

SAWYER, J. In these consolidated cases, intervenors appeal by leave granted the trial court order[1] denying their discovery requests to learn the identities of the plaintiff class. We affirm in part, reverse in part, and remand.

The underlying class actions in this case were brought by women convicted of felonies and incarcerated at facilities operated by the Department of Corrections (DOC). Plaintiffs filed these actions against the DOC, past and current directors and various wardens, as well as corrections officers. Plaintiffs alleged that they were the victims of systematic sexual harassment, sexual assault and retaliation inflicted by male corrections personnel. See *Neal v Dep't of Corrections*, 230 Mich App 202; 583 NW2d 249 (1998).

That litigation ultimately resulted in a settlement agreement in which DOC agreed to pay $100 million in installments over a six-year period paid into an escrow account and then distributed to the attorneys and class members according to an allocation plan.[2] DOC also agreed to waive the prohibition on prisoners maintaining accounts at financial institutions outside their DOC institutional account. The trial court also entered a protective order that prohibited the disclosure of the names of class members other than to necessary DOC and Attorney General employees. The purpose of the protective order was to prevent retaliation against the class members.

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[1] Though separate class actions were brought in the Washtenaw Circuit Court and the Court of Claims, the actions were consolidated below.

[2] The installments are due each October from 2009 through 2014. Approximately one-third of the disbursements have already been made and two-thirds remain to be paid.

Thereafter, the Wayne County Prosecutor and the Oakland County Reimbursement Unit/Fiscal Services Division, intervened seeking to discover the names of the class members to ensure that any outstanding orders of restitution, court costs, and court-appointed attorneys fees arising from judgments of sentence were paid from the proceeds of the settlement agreement. The Department of Human Services (DHS) intervened, seeking to ensure the payment of any outstanding child support obligations. Plaintiffs' counsel responded that it was her understanding that all applicable laws regarding these payments were being complied with and the protective order precluded the release of the identity of the class members. DOC similarly refused to comply with the discovery requests due to the protective order.

The trial court attempted to resolve the matter by having intervenors submit a list of the names of any female prisoner with an outstanding obligation who might have been a member of the class. Plaintiffs' counsel was to then compare those lists against the names of class members to determine if any class member had an outstanding obligation. This failed to resolve the dispute, however, because intervenors determined that it was logistically impossible for them to generate a comprehensive list of all potential claimants. They continued to maintain that they needed the list of names of the class members to check that list against their own records. Ultimately, the trial court declined to order the parties to disclose to intervenors the identities of the class members and this appeal followed.

We agree with intervenors' general proposition that there are constitutional and statutory provisions that support victims' rights to recover restitution, as well as the government's right to recover fines, costs and fees

imposed as part of a judgment of sentence. And we also agree that, to the extent that the settlement agreement between the parties is inconsistent with applicable statutes, those provisions are unenforceable. But that does not equate to intervenors having a right to discover the identities of the class members. On the other hand, we are not in agreement with the trial court's approach of putting the burden on intervenors to produce a list of prisoners who owe an obligation and are potentially a member of the class. Nor are we convinced that it was appropriate to put the burden on plaintiffs' counsel to determine if a potential obligor was a member of the class because that places on counsel a serious conflict of interest between protecting the interests of the client and the efforts of intervenors to collect the obligations owed.

In resolving this matter, we must begin by looking at the relevant statutory provisions. We review de novo questions of statutory interpretation. *People v Swafford*, 483 Mich 1, 7; 762 NW2d 902 (2009). In doing so, we discover the general resolution to this issue. At issue are the provisions of MCL 791.220h and MCL 600.5511.

MCL 791.220h provides as follows:

> (1) If a prisoner is ordered to pay restitution to the victim of a crime and the department receives a copy of the restitution order from the court, the department shall deduct 50% of the funds received by the prisoner in a month over $50.00 for payment of restitution. The department shall promptly forward the restitution amount to the crime victim as provided in the order of restitution when the amount exceeds $100.00, or the entire amount if the prisoner is paroled, transferred to community programs, or is discharged on the maximum sentence. The department shall notify the prisoner in writing of all deductions and payments made under this section. The requirements of this subsection remain in effect until all of the restitution has been paid.

> (2) Any funds owed by the Michigan department of corrections or to be paid on behalf of one or more of its employees to satisfy a judgment or settlement to a person for a claim that arose while the person was incarcerated, shall be paid to satisfy any order(s) of restitution imposed on the claimant that the department has a record of. The payment shall be made as described in subsection (1). The obligation to pay the funds, described in this section, shall not be compromised. As used in this section, "fund" or "funds" means that portion of a settlement or judgment that remains to be paid to a claimant after statutory and contractual court costs, attorney fees, and expenses of litigation, subject to the court's approval, have been deducted.
>
> (3) The department shall not enter into any agreement with a prisoner that modifies the requirements of subsection (1). Any agreement in violation of this subsection is void.

Much of the dispute related to victim restitution can be resolved by reference to this statute. First, it clearly puts the burden on DOC to withhold money from the settlement and forward to the victims any restitution ordered. Second, DOC has such an obligation only if a copy of the restitution order has been sent to the department.

We note that it should be unnecessary for intervenors to identify potential class members who have outstanding restitution obligations because *all* restitution orders relating to defendants that have been sentenced to the custody of the DOC should have been forwarded to the DOC for collection from prisoners' funds. Because MCL 791.220h(1) does not, by its terms, apply only to the proceeds of lawsuits against DOC, but to any prisoners funds, we would expect that all restitution orders would be automatically forwarded for any defendant sentenced to prison.

And by the clear mandate of the statute, the DOC must collect from prisoner funds any outstanding restitution obligation. Therefore, the DOC should already have been withholding from the disbursements funds allocated to any prisoner who had an outstanding restitution obligation until that obligation was satisfied.

We should note that attention must be paid to the differences between subsections (1) and (2). Subsection (1) only applies to prisoners and it limits the amount that can be deducted (50% of the funds received in excess of $50 in any given month). Subsection (2), on the other hand, applies to a "person" who receives money from a judgment or settlement against the DOC or a DOC employee. It is not limited to current prisoners, nor is there a limit to the amount that can be withheld. That is, all of the funds owed to a person arising from a settlement or judgment against the DOC or its employees are to be withheld until restitution is satisfied.[3] Therefore, the DOC should already have been withholding from the three previous disbursements any amounts that would be paid to a class member who had an outstanding restitution obligation (of which the DOC had a record) and should continue to do so in the three remaining disbursements until the restitution obligation is satisfied.

Plaintiffs argue that the protective order does not interfere with the enforcement of the statute for two reasons. First, once a prisoner is released from incarceration, her name is released to the DOC, which can

[3] The reference in subsection (2) to subsection (1) is only in regard to how the payment to the victim is made, not in reference to how the funds are withheld. That is, the DOC does not have to make payments to the victim until the accumulated amount exceeds $100 or the prisoner is released from incarceration.

then determine if any restitution needs to be paid. Second, for those class members who remain incarcerated, when the money is transferred into their institutional prison accounts, the DOC would automatically deduct the money to pay the restitution pursuant to subsection (1). While there is some logic to these arguments, they fail because they are premised on a third argument, which is flawed. That argument is that MCL 791.220h does not mandate that restitution be satisfied before settlement proceeds are distributed. As we discussed earlier, the clear meaning of subsection (2) is that the proceeds from a judgment or a settlement in litigation against the DOC must first be used to satisfy any outstanding restitution order filed with the DOC before any proceeds may be distributed to a prisoner.[4]

Accordingly, to the extent that the protective order does not allow for the disclosure of names to the DOC or its employees in order for the DOC to comply with its statutory obligations, or provide for some alternative method that ensures the DOC's compliance, that provision is invalid. The DOC has a clear statutory obligation to disburse the funds to the victims in payment of restitution obligations and an agreement in violation of law is unenforceable. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). And the fact that this agreement takes the form of a stipulated order does not change this basic principle because a stipulated order that does not conform to the law is void. *Miller v Miller*, 264 Mich App 497, 507 n 12; 691 NW2d 788

[4] The concern that DOC is not fully meeting this obligation is reflected in plaintiffs' brief on appeal when they indicate that it was DOC's clear intent in reaching the settlement to not be involved in the identification of class members and the allocation of settlement funds. While the DOC's desire to stay out of that process is understandable, it is not feasible given its statutory duty to collect restitution before the distribution of the proceeds.

(2004), rev'd on other grounds 474 Mich 27; 707 NW2d 341 (2005). Simply put, the parties could not stipulate to an order that relieves the DOC of its statutory obligations or that precludes the DOC from being able to fulfill its statutory obligations.

MCL 791.220h only resolves the question of restitution. With respect to court costs, etc., we must turn to MCL 600.5511, which provides in pertinent part as follows:

> (2) Subject to section 220h of 1953 PA 232, MCL 791.220h, and the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834, any damages awarded to a prisoner in connection with a civil action brought against a prison or against an official, employee, or agent of a prison shall be paid directly to satisfy any outstanding restitution orders pending against the prisoner, including, but not limited to, restitution orders issued under the state correctional facility reimbursement act, 1935 PA 253, MCL 800.401 to 800.406, the prisoner reimbursement to the county act, 1984 PA 118, MCL 801.81 to 801.93, 1982 PA 14, MCL 801.301, and the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834, any outstanding costs and fees, and any other debt or assessment owed to the jurisdiction housing the prisoner. The remainder of the award after full payment of all pending restitution orders, costs, and fees shall be forwarded to the prisoner.
>
> (3) Before payment of any damages awarded to a prisoner in connection with a civil action described in subsection (2), the court awarding the damages shall make reasonable efforts to notify the victims of the crime for which the prisoner was convicted and incarcerated concerning the pending payment of damages.

This statute, if applicable, would not only resolve the restitution issue, it would also resolve the issues relative to outstanding court costs and fees (but not the child-support issue). This statute clearly provides that any damage award to a prisoner arising out of a claim

against the department or its employees must first be utilized to pay any outstanding restitution, costs and fees, or other assessments owed to the jurisdiction housing the prisoner. Only after full payment of restitution, costs and fees may any money be paid to the prisoner.

Plaintiffs' primary argument against the application of MCL 600.5511 to this dispute is that it was not enacted until three years after the filing of these actions and, therefore, does not apply. We disagree. First, we note that this is true only for some of the claims. The *Neal* case was filed in 1996. But the *Anderson* case was not filed until 2003 and was consolidated with *Neal*. Therefore, even if we agree that the statute does not apply to cases filed before the statute was enacted, it would still apply to the *Anderson* claims. But we do need to resolve the issue with respect to the *Neal* claims.

The retroactivity issue was addressed in a prior appeal in this case. *Neal v Dep't of Corrections*, unpublished opinion per curiam of the Court of Appeals, issued February 23, 2006 (Docket Nos. 253543 and 256506). But we are not persuaded that that opinion controls here. Initially, because it is unpublished it is not precedentially binding. MCR 7.215(C)(1). Furthermore, neither are we persuaded that the law of the case doctrine applies. First, intervenors were not a party to the prior appeal. Second, while the prior appeal considered the retroactive application of the prison litigation reform act, MCL 600.5501 *et seq.*, it considered it in relation to a different aspect of the act. Specifically, it considered whether the requirement of MCL 600.5503(1) that a prisoner exhaust all administrative remedies before filing suit, barred claims that had accrued before the enactment of the statute. *Neal*,

unpub op at 3. This Court concluded that the requirement only applied to those claims that had accrued after the effective date of the act.

In this appeal we deal not with the question whether a claim is barred by the statute, but with how the proceeds of a settlement are to be disbursed. The settlement was reached after the effective date of the act, when all parties would be aware of the provisions of the law. Thus, while applying MCL 600.5503(1) retroactively to bar the claim itself would impair or abrogate a vested right, directing the distribution of settlement proceeds does not. In other words, the application of MCL 600.5511(2) to this case would not retroactively impair or abrogate plaintiffs' rights, but merely ensure the payment of their preexisting financial obligations from proceeds to which they became entitled after the enactment of the statute. Furthermore, we view this portion of the statute as being remedial or procedural in nature and, therefore, it may be applied retroactively. See *Tobin v Providence Hosp*, 244 Mich App 626, 661-662; 624 NW2d 548 (2001).

Accordingly, we conclude that the DOC may not disburse any funds to any plaintiff class member until there has been "full payment of all pending restitution orders, costs, and fees" as required by MCL 600.5511(2) for that particular plaintiff class member. Because disbursement should not have been made until the obligations had been satisfied, the DOC should seek to recover those payments to any particular class member if the future payments owed that particular class member will prove inadequate to meet the obligations under the statute.

While these statutes resolve the obligations of the DOC with respect to the disbursement of the settlement proceeds, it does not itself directly resolve the question

whether the identities of the class members must be disclosed. Initially, we note that nothing in these statutes gives intervenors any particular right to know the identity of the class members. While intervenors certainly have an interest in ensuring that the statutes are complied with and the restitution, fees and costs are properly paid, that does not equate with the right to receive the names of the class members. If the trial court is able to fashion a method to ensure that the DOC is meeting its statutory obligations with respect to the proper disbursement of the proceeds of the settlement without the necessity of disclosing the names of the class members, it is certainly free do so.

We leave it initially to the trial court to determine an appropriate method of doing so. Perhaps the trial court will find it appropriate to appoint a Special Master who will have access to the names of the class members and the DOC records to determine which class members have outstanding obligations and which do not. Or maybe the answer lies in modifying the protective order to allow the release of names, even those currently incarcerated, to a limited number of DOC employees who will oversee compliance with the statutes. We offer these only as suggestions and not as directions. Our only directions are these: (1) the DOC must comply with the statutory provisions to ensure that the restitution, fees and costs required to be paid by a class member are, in fact, paid before any disbursement to that class member, (2) plaintiffs' counsel is not to be the gatekeeper to determine compliance or otherwise to identify which class members have such an obligation, and (3) there must be some oversight mechanism to confirm that the DOC does, in fact, discharge its obligations. We also direct that any future disbursement of funds is to be suspended until a satisfactory method is in place to ensure compliance with the statute.

We do note, however, a statutory provision that may preclude complete concealment of the names of the class members. As intervenors point out, MCL 600.5511(3) obligates the trial court in this matter to make reasonable efforts to notify the victims of the pending payment of damages before any payment may be made to the prisoner. Of course, the notification does not have to disclose that any such damage payment is coming from the proceeds of this particular lawsuit. Nor is the trial court obligated to make public the identity of the victims to whom the notices are sent. But because the notices must be sent, it is conceivable that the identity of a currently incarcerated class member might become known. Nonetheless, the trial court is obligated to comply with this statute. According to intervenors, the trial court has failed to comply with its statutory duty to provide notice. Indeed, if in fact the trial court has not been supplied with a list of names of the class members, then it presumably would be impossible for the trial court to have complied with this duty.

Next, intervenors argue that the trial court lacked the authority to issue a protective order because MCR 2.302(C) requires a motion and this order was entered by stipulation. This issue was not raised below and, therefore, is not preserved for review. *Keenan v Dawson*, 275 Mich App 671, 681; 739 NW2d 681 (2007).

In a similar argument, intervenors argue that the protective order is invalid because it does not meet the requirements of MCR 8.119(F) regarding sealed records. This argument is without merit because it does not appear that the names of the class members were ever part of the court record. In short, the protective order does not, in fact, seal the court records.

It is also argued that plaintiffs are obligated to disclose their names in the caption of the complaint

under MCR 2.113(C)(1)(b). We do not read that rule as requiring that all members of a class in a class action suit be named in the caption of a complaint. As MCR 3.501(A)(1) states, in class actions there are one or more representative parties from the class. Reading these two rules together, we conclude that only the representative parties must be named in the caption of the complaint, not all class members.

Finally, we turn to the issue of the collection of child support by intervenor DHS. MCL 791.220h and MCL 600.5511 do not resolve this issue because they do not deal with the collection of child support, but MCL 552.625a does. That statute provides for an automatic lien on the assets, including settlements and judgments arising from a civil action, of any person obligated to pay child support once that support becomes due and unpaid. MCL 552.625a(1). While this statute is somewhat more procedurally complex than the other two statutes involved in this case, it nonetheless provides a statutory basis under which the DOC may be obligated to withhold funds from the settlement disbursements and remit them in payment of child support obligations.

We note that DHS is taking a very flexible and reasonable approach to this issue. While DHS is not opposed to merely lifting the protective order, it is willing, and indeed had suggested, a method designed to maximize the security of the identity of the class members and to protect the privacy of those members who do not have support obligations. It proposed that a limited number of individuals in the State Court Administrative Office should have access to the names of the class members, determine which have outstanding support obligations, and institute the necessary procedures to collect those support obligations from the settlement amount. This would appear to

be a feasible method of ensuring that DHS can exercise its obligations to collect child support, while maintaining the highest degree of security over the identities of the class members. It would certainly be more secure and less intrusive than that which DHS is already empowered to do by statute. Under MCL 400.234(1), DHS's Office of Child Support is empowered to request any information or record that assists in implementing the Office of Child Support Act, MCL 400.231 *et seq.* from any public or private entity or financial institution. This would presumably authorize the office to obtain the class member list from the DOC and the financial institution serving as the escrow agent, and possibly the trial court itself[5] and plaintiffs' counsel. But we need not decide the scope of DHS's authority under the statute as it does not appear that it has invoked its authority under the statute.

In any event, as with our suggestions regarding the oversight of the collection of restitution, fees and costs, we are not requiring the trial court to adopt the proposed method. If the parties are able to agree on a different method, they are free to do so. And in the absence of an agreement, the trial court is free to adopt DHS's suggestion, or to develop its own method as long as that method is consistent with this opinion. That is to say, the method must permit DHS to effectively collect as much of the support obligation owed by class members as possible from the proceeds of the settlement and to do so before any further proceeds are distributed.

Finally, we are aware that we are placing on the trial court an unusual burden in overseeing the collection of

[5] Even if the trial court does not currently possess the list of names it is obligated to send notice to the victims of the class members. This presumably means that at some point, the trial court will have to possess the names in order to comply with this requirement.

the various financial obligations involved in this case, a burden greater than that which would normally be placed on a trial court that oversees a civil case where the plaintiff receives an award and happens to owe one or more of the obligations involved in this case. But the trial court in essence took this burden on itself when it entered the protective order. We do not disparage the actions of the trial court in doing so as we recognize the reasons for the protective order. But just as the unique circumstances of this case necessitated the protective order, they also necessitate greater involvement by the trial court to ensure that the order does not impede the DOC and DHS from meeting their statutory duties.[6] Moreover, these unique circumstances do not shield plaintiffs from meeting their financial obligations.

In summary, the DOC is obligated to meet its obligations under MCL 791.220h and MCL 600.5511 to pay from the settlement proceeds any restitution, fees and costs that any class member is obligated to pay under a judgment of sentence before any future disbursement may be made to such a class member. If the future amounts due to such a class member are inadequate to meet those obligations, the DOC shall make reasonable efforts to recover any of the proceeds previously paid to such a class member to satisfy those obligations. To the extent that the protective order prevents the DOC from meeting its statutory duty in this respect, the trial court shall modify the protective order in such a manner that the DOC is able to fulfill its duty. Similarly, the trial court shall make any necessary modifications to the protective order to ensure that DHS is able to discharge its duty to collect any outstanding support from class members.

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[6] And it requires adequate third-party oversight to ensure that those duties are properly discharged since the normal oversight is hampered by the secrecy imposed by the protective order.

We encourage the parties to arrive at a mutually agreeable method to implement these requirements. But if the parties are unable to do so, the trial court shall fashion such a method. In doing so, the trial court shall be guided by the principle that the statutory duties of the DOC and DHS take priority over the protective order. That is, a settlement agreement cannot relieve a party (or a nonparty) of a duty imposed by statute. Any agreement must be consistent with the laws of this state. Furthermore, plaintiffs' counsel shall not serve as the gatekeeper to determine which members of the class owe such obligations. While the confidentiality of the identities of the class members should be maintained to the extent possible, oversight must be provided by some entity not associated with plaintiffs or the DOC. Finally, if it has not already done so, the trial court shall promptly send notice to the victims of the class members as required by MCL 600.5511(3).

To ensure that there are no future disbursements in violation of defendant's and the intervenor's statutory duties, we order that any future disbursements under the settlement agreement are stayed until a procedure is in place that ensures that any outstanding child support, restitution, costs and fees are collected from the settlement proceeds before the proceeds are disbursed to any class members owing such an obligation. This stay provision shall be given immediate effect. MCR 7.215(F)(2).

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction. No costs.

HOEKSTRA, P.J., and SAAD, J., concurred with SAWYER, J.

SMITHAM v STATE FARM FIRE AND CASUALTY COMPANY

Docket No. 304600. Submitted June 6, 2012, at Detroit. Decided August 9, 2012, at 9:00 a.m.

Geraldine Smitham and John Yun, who acted as a limited guardian for Smitham's financial affairs, brought an action in the Oakland Circuit Court against State Farm Fire and Casualty Company, alleging that defendant had breached an insurance contract by failing to reasonably investigate Smitham's claim, failing to act in good faith, and failing to fully pay Smitham's claim for benefits in a timely manner. Smitham lost personal property during a robbery and the following day, February 28, 2008, she filed a claim with defendant under her applicable fire insurance policy. On August 7, 2008, defendant denied the claim citing Smitham's failure to submit certain documents, but on June 26, 2009, it reopened the claim. Defendant again denied liability in a letter dated June 4, 2010. Defendant later sent Smitham a check for a small part of her claimed loss. Under the fire insurance policy, Smitham had one year in which to commence an action, but in the event a claim was formally denied, in whole or in part, the period of time in which suit could be commenced against defendant was extended by the number of days between the date the notice of loss was provided to defendant and the date the claim was formally denied. Plaintiffs brought suit on October 29, 2010, and defendant moved for summary disposition on the basis that the claim was barred by the one-year limitations period specified in the policy. The court, Rudy J. Nichols, J., ruled in favor of defendant, holding that plaintiffs' action was not timely filed. Plaintiffs appealed.

The Court of Appeals *held*:

1. MCL 500.2833(1)(q) requires that a policy of fire insurance specify that an action must be commenced within one year after the loss or within the time specified in the policy, whichever is longer, and states that the time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability. In this case, defendant asserted that plaintiffs' complaint was barred by the policy's one-year limitations period because Smitham's claim was paid, not denied, and thus, the tolling provision could not save the lawsuit. The

policy language at issue, which conditioned tolling on formal denial of liability, was absolutely void under MCL 500.2860 because it was not compatible with the statutorily mandated tolling provision. The statutory language includes no condition limiting its applicability to situations in which there is a formal denial of liability. The reference in the statutory language to a formal denial of liability is to a period in time, it is not a condition on applicability.

2. When an insurer denies a claim and then agrees to reopen it, the initial denial is effectively withdrawn. In this case, defendant argued that, regardless of the validity of its policy language concerning tolling, plaintiffs' claim was still untimely under the statutory limitations period. However, its calculation of the running of the limitations period assumed that the period between its initial denial of the claim and its reopening of the claim counted against the one-year period, but the reopening of the claim effectively withdrew the initial denial. A formal denial of an insurance claim must be explicit and direct. Tolling may occur with respect to an action for underpayment of a claim, and an insured's awareness of the amount of a payment does not establish a formal denial of the claim. Defendant's partial payment in this case was not an explicit and direct formal denial as was required to end tolling the tolling period. To end the tolling period following a partial payment, the insurer must explicitly indicate that it is denying all liability in excess of what it has paid.

3. Under MCL 500.2833(1)(m), Michigan fire insurance policies must state that if the insured and the insurer fail to agree on the actual cash value or amount of the loss, either party may make a written demand that the amount of the loss or the actual cash value be set by appraisal. Invocation of the appraisal process is discretionary. Accordingly, plaintiffs' failure to use the appraisal process in this case to challenge defendant's loss evaluation did not provide a basis for granting summary disposition in favor of defendant.

Reversed and remanded for further proceedings.

1. INSURANCE — FIRE INSURANCE — PERIOD OF LIMITATIONS — TOLLING — FORMAL DENIAL OF LIABILITY.

Michigan policies of fire insurance must specify that an action must be commenced within one year after the loss or within the time specified in the policy, whichever is longer, and that the time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability;

policy language that conditions tolling on the formal denial of liability, however, is absolutely void (MCL 500.2833[1][q], MCL 500.2860).

2. INSURANCE — FIRE INSURANCE — FORMAL DENIAL OF LIABILITY — UNDERPAYMENT.

Tolling may occur with respect to an action for underpayment of a claim for fire insurance proceeds, and an insured's awareness of the amount of a payment does not establish a formal denial of the claim; rather, to end the tolling period following a partial payment, the insurer must explicitly indicate that it is denying all liability in excess of what it has paid (MCL 500.2833[1][q]).

3. INSURANCE — DENIAL OF LIABILITY — REOPENING OF CLAIM.

When an insurer denies a claim and then agrees to reopen it, the initial denial is effectively withdrawn.

Cooper Law Firm, PLLC (by *John J. Cooper*), for Geraldine Smitham and John Yun.

Drake & Franco, PLC (by *Patrick J. Drake*), for State Farm Fire and Casualty Company.

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

JANSEN, P.J. Plaintiffs appeal by right an order granting summary disposition to defendant under MCR 2.116(C)(7). The trial court granted summary disposition on the basis that plaintiffs' action for breach of an insurance policy was untimely filed. We hold that the language of the insurance policy written by defendant, which conditions the tolling of the period in which plaintiffs were eligible to file a claim on defendant's formal denial of liability, is incompatible with the plain language of MCL 500.2833(1)(q); accordingly, that portion of defendant's policy is absolutely void under MCL 500.2860. We therefore conclude that the trial court erred by granting summary disposition to defendant and reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

The parties essentially agree on the facts and key dates. Plaintiff Geraldine Smitham[1] occupied an apartment in Troy, Michigan with her daughter. On February 27, 2008, Smitham's personal property was stolen from her apartment during a robbery. The following day, Smitham and her daughter filed a claim with defendant. On August 7, 2008, State Farm denied the claim for failure to submit a "Sworn Statement in Proof of Loss" and completed "Personal Property Inventory" forms.

On June 26, 2009, defendant reopened the claim.[2] On July 21, 2009, in a letter, defendant sent plaintiffs copies of past letters concerning the claim and personal property inventory forms.

In a June 4, 2010, letter from defendant to Smitham's daughter, defendant denied liability on the basis that Smitham misrepresented and concealed material facts and committed fraud. The letter states, in relevant part, "You are hereby notified the company formally denies any and all liability to you under the policy . . . ."

With an August 3, 2010, letter, defendant enclosed a "settlement draft totaling $4,700.00 . . . ." The letter states:

> Enclosed is the settlement draft totaling $4,700.00 in reference to your personal property claim.
>
> We have received correspondence from the law firm of Ahern and Fleury indicating that they no longer need to be

[1] Plaintiff John Yun was appointed by the Oakland County Probate Court as limited guardian for Smitham's financial affairs.

[2] In its motion for summary disposition, defendant claimed that June 26, 2009, was the date that Smitham requested the claim be reopened. Plaintiffs' response brief indicated that it had no reason to deny that June 26, 2009, was the date Smitham requested the claim be reopened.

> listed as a payee on the draft. Enclosed is a copy of the prior correspondence forwarded to you on June 9, 2010.
>
> Please contact me at the number below should you have any questions.

According to defendant's motion for summary disposition, the check "was returned for unknown reasons[.]" A second check was issued on October 12, 2010. Smitham and her attorney signed the check and it was cashed on October 22, 2010. The signing and cashing occurred after Smitham's attorney "had a conversation with counsel for the Defendant as well as a representative of the Defendant as it relates to the settlement amount."

Plaintiffs filed this action on October 29, 2010. In their complaint, plaintiffs alleged that Smitham notified defendant of the loss and delivered satisfactory proof, but that defendant had paid only "a small amount due on the claim."[3] Plaintiffs alleged that defendant had breached the insurance contract by failing to reasonably investigate Smitham's claims, failing to act in good faith, and failing to timely pay her claim.

In its answer, defendant asserted that it had paid all money due on Smitham's claim. As an affirmative defense, defendant alleged that plaintiffs' suit was barred by the one-year limitations period in the insurance policy, inasmuch as the loss had occurred in February 2008, and plaintiffs did not file their complaint until October 29, 2010.

Defendant filed a motion for summary disposition under MCR 2.116(C)(7) on March 22, 2011. Defendant contended that the tolling provision required by MCL

[3] At oral argument, plaintiffs' attorney indicated that, in plaintiffs' estimation, the total amount of loss was between $90,000 and $150,000.

500.2833(1)(q) was inapplicable because it had paid the claim. In addition, defendant argued that even if tolling applied, the claim was untimely. Defendant calculated that 323 days elapsed from its initial denial on August 7, 2008, until the reopening of the claim on June 26, 2009. Then defendant calculated that the limitations period began to run again on August 4, 2010, the date when Smitham was "made aware of the payment amount . . . ." Accordingly, defendant argued that the complaint needed to have been filed "no later than September 15, 2010."

The trial court agreed with defendant, ruling that plaintiffs' action was untimely because it was not commenced within one year after the loss. Accordingly, the trial court granted summary disposition in favor of defendant. This appeal followed.

II. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law."[4] Summary disposition is proper under MCR 2.116(C)(7) when a claim is barred "because of . . . [a] statute of limitations . . . ."

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint

[4] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> are accepted as true unless contradicted by documentation submitted by the movant.[5]

III. ANALYSIS

MCL 500.2833(1)(q) requires that a policy of fire insurance[6] specify

> [t]hat an action under the policy may be commenced only after compliance with the policy requirements. An action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability.

The parties agree that Smitham notified defendant of the loss. Plaintiffs contend that after the reopening of the claim on June 26, 2009, defendant's August 2010 settlement draft alone was not a formal denial of liability and, therefore, the tolling period never concluded.

Defendant relies on the limitations period in the policy. Defendant's policy states, in relevant part:

> In the event a claim is formally denied, in whole or in part, the period of time in which a suit or action may be commenced against the company is extended by the number of days between the date the notice of the loss is provided to the company and the date the claim is formally denied.

According to the policy, tolling is applicable only "[i]n the event a claim is formally denied . . . ." Thus, defendant argues, if the insurer does not formally deny a

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[5] *Id*. at 119.

[6] Although this case addresses the loss of personal property resulting from theft, the parties agree that plaintiff's insurance policy was a fire insurance policy and that MCL 500.2833(1)(q) controls here.

claim, then the tolling described in the policy is inapplicable, and the claim must be filed within one year. Defendant asserts that it never formally denied the claim; rather, it paid it. Therefore, defendant contends that tolling was inapplicable and the action was barred by the one-year time limit. We disagree.

Defendant's arguments are comparable to those rejected by the United States District Court for the Eastern District of Michigan in *Jimenez v Allstate Indemnity Company.*[7] That decision also involved an alleged underpayment of a claim and the application of MCL 500.2833(1)(q). The Allstate policy at issue in *Jimenez* stated, "In the event we formally deny liability, the time for commencing a suit or action is tolled from the time you notify us of the loss until we formally deny liability."[8] The insured suffered a loss in June 2006 and submitted a claim four days later. On November 20, 2006, the insurer sent a check for $48,000, with an accompanying letter that stated it was awaiting verification of lost rent and some receipts. The insured cashed the check on December 6, 2006, but sought additional payment. On February 2, 2007, the insurer sent a letter to the insured stating that it was standing by its previous evaluation of the property.[9] The insured filed his action on October 22, 2007. The insurer argued that it had never denied liability, formally or otherwise.[10] The insurer contended that under the policy and the mandatory statutory provision, tolling was conditioned on a formal denial of liability, and therefore, the action was not timely filed.[11]

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[7] *Jimenez v Allstate Indemnity Co*, 765 F Supp 2d 986 (ED Mich, 2011).

[8] *Id*. at 990 (quotation marks omitted).

[9] *Id*. at 989-990.

[10] *Id*. at 992.

[11] *Id*. at 994.

The district court rejected the position that the insurer had never denied liability. On the basis of *Bourke v North River Insurance Company*,[12] the court first reasoned that "denial of liability" did not mean "denial of coverage."[13] The court explained that Bourke "demonstrates that denial of liability is broader than denial of coverage, and includes underpayment of a claim. In other words, a denial of liability includes a denial of any *further* liability . . . ."[14] However, a *formal* denial such as is necessary to end tolling must be explicit and unequivocally impress upon the insured the need to pursue further relief in court.[15] Addressing the facts of the case, the court reasoned that the insurer's issuance of a check to the insured was not a formal denial because the accompanying letter implied that the insured would consider making additional payments if additional materials were submitted.[16] The court instead determined that the insurer formally denied liability with the February 2, 2007, letter, which the court opined was "sufficient to place Jimenez on notice that Allstate would not supplement its payment of $48,000, and that Jimenez's next move was a lawsuit."[17]

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[12] *Bourke v North River Ins Co*, 117 Mich App 461; 324 NW2d 52 (1982). In *Bourke*, the insurers disputed the insured's damages and the timeliness of the insured's action against one insurer depended on whether it had formally denied the claim.

[13] *Jimenez*, 765 F Supp 2d at 990-991.

[14] *Id*. at 991.

[15] *Id*. at 991-992, citing *Mt Carmel Mercy Hosp v Allstate Ins Co*, 194 Mich App 580, 587; 487 NW2d 849 (1992), vacated in part on other grounds in *Mt Carmel Mercy Hosp v Allstate Ins Co (On Rehearing)*, unpublished opinion per curiam, issued March 22, 1993 (Docket No. 119978); *Lewis v Detroit Auto Inter-Ins Exch*, 426 Mich 93, 101; 393 NW2d 167 (1986), overruled on other grounds by *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005).

[16] *Jimenez*, 765 F Supp 2d at 992 n 3.

[17] *Id*. at 992.

The court calculated that the action was timely filed because the one-year period was tolled from the date that the insured provided notice (June 15, 2006) to the date that the insurer formally denied further liability (February 2, 2007).

But according to the *Jimenez* court, even if the insurer had never formally denied liability, the claim was timely because the policy language that conditioned tolling on a formal denial was void. The insurer argued, as defendant does in this case, that the policy conditioned tolling on the insurer's formal denial of liability. The *Jimenez* court agreed with this interpretation of the policy and then explained why the policy language conflicted with the statutorily mandated tolling provision:

> Although Allstate's limitation provision is similar to the mandatory statutory provision, it differs in one very important respect. Allstate's tolling provision is made conditional upon Allstate formally denying liability: "*In the event we formally deny liability*, the time for commencing a suit or action is tolled from the time you notify us of the loss until we formally deny liability." The statutory provision, by contrast, includes no condition on tolling: "The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability." The two provisions are irreconcilable, as demonstrated by the different outcomes produced here depending on which provision is applied:
>
> • Applying the statutory provision, the period is tolled from the time of notice until Allstate formally denies liability. Since Allstate has yet to do so,[18] the period never expired before Jimenez filed suit, making the action timely.
>
> • Applying Allstate's provision, however, the period has never been tolled because Allstate did not formally deny

[18] This discussion occurs in the portion of the opinion in which the court assumed arguendo that the insurer did not formally deny liability.

> liability. The one-year period expired one year after the loss, well before Jimenez filed his action, making it untimely.
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> * * *
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> Unlike the contractual provision, the mandatory provision contains no language that limits its applicability to situations where there is a formal denial of liability; it applies in *all* cases, whether or not there is a formal denial of liability. The reference to "formal denial of liability" at the end of the third sentence refers to a period in time, not a condition upon applicability: "The time for commencing an action is tolled from the time the insured notifies the insurer of the loss *until* the insurer formally denies liability."[19]

The court further rejected the insurer's argument that a ruling that allowed tolling with respect to an action for underpayment of a claim would cause the absurd result that the period for suing for an alleged underpayment would remain open indefinitely.[20] The court explained:

> [T]he Court's reading of the statute does not lead to absurd results. It is entirely reasonable to require a formal denial in order to re-trigger the running of the one-year period. If Allstate wants the limitation period to continue running after it pays its estimate of the loss, it can simply notify the insured in no uncertain terms that it is denying all liability in excess of what has paid [sic], thereby placing the insured on clear notice that the limitation period has resumed running. The Court finds misplaced Allstate's fear that the court's reading will allow an insured to submit a claim, accept payment, ignore the appraisal provision, and then file suit years later alleging underpayment. If Allstate wants to avoid this possibility, it need only

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[19] *Jimenez*, 765 F Supp 2d at 993-994, quoting MCL 500.2833(1)(q) (emphasis added in *Jimenez*).

[20] *Jimenez*, 765 F Supp 2d at 994-995.

> explicitly tell the insured that it is formally denying all further liability or otherwise expressly indicate that no future payments will be made. Travelers did this in *Bourke*, and thereby avoided indefinite liability.[21]

Having concluded that the policy language was contrary to the provision mandated by MCL 500.2833(1)(q), the court explained that the policy provision was "absolutely void"[22] and the statutory provision would be read into the policy.

> Contractual provisions that are contrary to the mandatory provisions are "absolutely void," and the policy is enforced without regard to the void provision, as if the mandatory provision were expressly included in the policy. [MCL 500.2860]; *see, e.g.*, *Randolph* [*v State Farm Fire & Cas Co*, 229 Mich App 102, 105-107; 580 NW2d 903 (1998)] (finding that contractual limitations provision that did not provide for tolling was void, and mandatory limitation provision allowing tolling was substituted by operation of law); see also *Rory* [*v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005)] (unambiguous contractual provision providing for a shortened period of limitations must be enforced as written *unless the provision would violate law* or public policy).
>
> * * *
>
> Applying the statutory provision in [MCL 500.2833(1)(q)], Jimenez's claim is not barred. Again, without the clause "in the event we formally deny liability" preceding the tolling provision, tolling occurs from the time notice of the loss is given until there is a formal denial of liability. Because, as the Court presently assumes, Allstate

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[21] *Id*. at 995.

[22] MCL 500.2860 ("Any provision of a fire insurance policy, which is contrary to the provisions of this chapter, shall be absolutely void, and an insurer issuing a fire insurance policy containing any such provision shall be liable to the insured under the policy in the same manner and to the same extent as if the provision were not contained in the policy.").

> has not formally denied liability, the one-year period was tolled from June 15, 2006, when Jimenez gave notice—at which time only four days of the one-year period had elapsed—until the time he filed his lawsuit. Therefore, his action was timely.[23]

Although this Court is not bound to follow *Jimenez*, it has long been recognized that when a federal court construes a state statute, its opinions are highly persuasive.[24] Accordingly, we hold that *Jimenez* offers persuasive reasons for concluding that the trial court erred by granting defendant's motion for summary disposition. In arguing that tolling was inapplicable here, defendant relies on the language of the policy that conditions tolling on a formal denial of liability, which defendant contends did not occur because defendant paid the claim. However, the policy language is not compatible with the statutorily mandated provision, which is not conditional. Because the provision is contrary to the statute, it is absolutely void.[25] Concluding that tolling may occur with respect to an action for underpayment of a claim is reasonable, as an insurer may end the tolling period by explicitly indicating that the insurer is denying all liability in excess of what it has paid.

Defendant argues that under *Rory*[26] the unambiguous contractual provision must be enforced as written. We disagree. The Court in *Rory* acknowledged that a contractually shortened limitations period is unenforceable if it violates the law or public policy.[27] The contrac-

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[23] *Jimenez*, 765 F Supp 2d at 993-994.

[24] *Continental Motors Corp v Muskegon Twp*, 365 Mich 191, 194; 112 NW2d 429 (1961).

[25] MCL 500.2860.

[26] *Rory*, 473 Mich 457.

[27] *Id*. at 470.

tual provision in defendant's policy restricts tolling in a manner that is simply incompatible with the tolling provision mandated by MCL 500.2833(1)(q). Accordingly, the contractual provision, though unambiguous, conflicts with the plain language of the statute, and is unenforceable.

Defendant also asserts that even if tolling is applicable, plaintiffs' claim is time-barred. In its motion for summary disposition, defendant explained the calculation underlying this assertion:

> Although Defendant argues that the tolling period is inapplicable because the claim was paid, Defendant also argues the claim is time barred under any analysis. More specifically, the claim was denied for non-cooperation on August 7, 2008 and re-opened on June 26, 2009, which time period equals 323 days. The settlement check was mailed to the Plaintiff on August 4, 2010 and again on August 12, 2010. Clearly, Plaintiff was made aware of the payment amount no later than August 4, 2010. Accordingly, Plaintiff's Complaint, in order to comply with the limitations period, must have been filed no later than September 15, 2010. (323 days from August 7, 2008 until June 6 [sic—26], 2009 and 43 days from August 4, 2010 until September 15, 2010). Instead, Plaintiff filed suit on October 29, 2010 . . . . Under any analysis, Plaintiff's Complaint is time barred.

This argument is echoed in defendant's brief on appeal.

The calculation is based on two questionable premises. First, defendant's calculation assumes that the period from the initial denial to the reopening of the claim (323 days) should be counted against the one-year period.[28]

[28] Defendant's assertion that the 323 days should be counted against the one-year period directly conflicts with the following statement from its appellate brief: "State Farm acknowledges that the limitations period was tolled until the claim was reopened."

However, when an insurer denies a claim and then agrees to reopen it, the initial denial is effectively withdrawn.[29]

Second, defendant's argument assumes that Smitham's awareness of the amount of defendant's payment was sufficient to end the tolling period.[30] Pursuant to MCL 500.2833(1)(q), tolling begins with the notice of loss and ends when the insurer formally denies the claim. Moreover, "under this state's jurisprudence, a 'formal denial' must be explicit and direct."[31] An insured's awareness of the amount of the payment, by itself, does not establish a formal denial of the claim. As suggested in *Jimenez*, the insurer retriggers the running of the one-year period by "notify[ing] the insured in no uncertain terms that it is denying all liability in excess of what [it] has paid, thereby placing the insured on clear notice that the limitation period has resumed running."[32]

Finally, we note that the trial court alluded to plaintiffs' failure to use the appraisal process to challenge defendant's evaluation of the loss. In defendant's brief on appeal, defendant does not mention the appraisal

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[29] See *McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 86-87; 795 NW2d 205 (2010) (finding a question of fact about when the formal denial occurred in light of evidence that the insurer withdrew its denial while it reinvestigated the claim).

[30] Defendant refers in its brief and motions to a conversation between plaintiffs' counsel, defendant's counsel, and a representative that purportedly occurred before Smitham cashed the check. The parties have not supplied any evidence about the substance of the conversation, and we therefore have no basis for evaluating whether the conversation is relevant to whether and when a formal denial occurred.

[31] *McNeel*, 289 Mich App at 111 (K. F. KELLY, J., dissenting), citing *Mt Carmel Mercy Hosp*, 194 Mich App at 587, and *Mousa v State Auto Ins Cos*, 185 Mich App 293, 295; 460 NW2d 310 (1990). See also *Jimenez*, 765 F Supp 2d at 991-992.

[32] *Jimenez*, 765 F Supp 2d at 995.

process, much less argue that it is relevant to tolling. Plaintiffs, however, correctly argue that invocation of the appraisal process is discretionary;[33] accordingly, plaintiffs' failure to use the appraisal process to challenge defendant's loss evaluation can hardly be a basis for granting summary disposition to defendant. Moreover, there is no basis for concluding that failure to invoke it affects the timeliness of an action for alleged underpayment of a claim.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

CAVANAGH and HOEKSTRA, JJ., concurred with JANSEN, P.J.

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[33] MCL 500.2833(1)(m).

PROTECT MI CONSTITUTION v SECRETARY OF STATE

Docket No. 311504. Submitted August 6, 2012, at Lansing. Decided August 14, 2012, at 9:00 a.m. Reversed and mandamus order vacated, 492 Mich 860.

Protect MI Constitution (PMC) filed an original action in the Court of Appeals against the Secretary of State, seeking a writ of mandamus to direct the Secretary to reject a ballot question petition for a constitutional amendment filed by intervening defendant, Citizens for More Michigan Jobs (CFMMJ). CFMMJ, a ballot question committee, collected signatures for a constitutional amendment proposal to be placed on the November 2012 general election ballot. The CFMMJ proposal would have amended Const 1963, art 4, § 41 to expand casino gaming in the state by allowing a fourth casino in Detroit and seven other casinos at specific locations, as well as addressing subjects related to gaming that are governed presently by the Michigan Gaming Control and Revenue Act MCL 432.201 *et seq*., a 1996 voter-initiated law. PMC claimed that the proposal would amend the gaming act without following the constitutional procedures necessary to amend a voter-initiated law, without following the constitutional procedures requiring a title and republication of the statute to alter, revise, or amend an existing law and that the petition would impermissibly advance more than one purpose, which was incapable of expression in 100 or fewer words.

The Court of Appeals *held*:

1. The Court of Appeals has jurisdiction over an original action for mandamus against a state officer, such as the Secretary of State. A writ of mandamus is an extraordinary remedy but it is the appropriate remedy for a party seeking to compel action by election officials. The plaintiff seeking mandamus must show that (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform the requested act, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. The Court of Appeals has jurisdiction to issue a writ of mandamus against the Secretary of State in this ballot question petition.

2. Election cases are of a special nature and ordinary citizens have standing to enforce the law in such cases. In the absence of a statute to the contrary, a private person may enforce by mandamus a public right or duty relating to elections without showing a special interest distinct from the public's interest. The general interest of ordinary citizens to enforce the law in election cases is sufficient to confer standing to seek mandamus relief. PMC had standing to bring this mandamus action against the Secretary of State to prevent inclusion of the proposed constitutional amendment on the November 2012 ballot.

3. A ballot issue controversy is ripe for review when it is not dependent on the Board of State Canvassers' counting or consideration of the petitions but involves a threshold determination whether the petitions on their face meet the constitutional prerequisites for acceptance. The case was ripe for review because the constitutional issue was limited to the procedure employed by CFMMJ to alter the gaming act by means of a constitutional amendment, and the proposal's eligibility for the ballot; the case was not dependent on the Board of State Canvassers' counting or consideration of the petitions.

4. In an action for mandamus involving an election ballot, the Court of Appeals must examine the constitutional amendment initiative to determine its eligibility for the ballot in light of constitutional prerequisites for acceptance. An act is ministerial if it is prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment. The Secretary of State's decision to reject or accept the CFMMJ petition would be ministerial, and thus subject to a mandamus order, after the Court of Appeals determined whether the CFMMJ petition would satisfy the constitutional requirements for placement on the general election ballot because such a decision would not require the exercise of judgment or discretion.

5. Const 1963, art 12, § 2 allows voters to amend the constitution by voter initiative, while under Const 1963, art 2, § 9, an initiated law may be amended or repealed by a vote of the electors unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the Legislature. To provide notice to the public of the full effects of a proposed amendment, Const 1963, art 4, § 25 requires that no law, including the revision or the alteration of an initiative law, shall be revised, altered or amended by reference to its title only; the section or sections of the act altered or amended must be reenacted and published at length. Because the gaming act does not provide

another means for its amendment, a vote of the electorate or a three-fourths vote in each house of the Legislature is required for its amendment. The CFMMJ proposed constitutional amendment may not be placed on the November election ballot because the CFMMJ petition failed to notify the public by publishing at length the sections of the voter-initiated gaming act that the proposed constitutional amendment would alter as required by Const 1963, art 4, § 25.

Writ of mandamus issued and the Secretary of State ordered to reject CFMMJ's petition and disallow it from the ballot.

RONAYNE KRAUSE, J., concurring in part and dissenting in part, did not take issue with the majority's position that the CFMMJ petition did not conform to the requirements of the Michigan Constitution and agreed that the Secretary of State has a clear legal duty to evaluate ballot proposals for such compliance. Judge RONAYNE KRAUSE concurred with the majority to the extent that the writ of mandamus directed the Secretary to perform this duty, but dissented to the extent that the majority determined that it had authority to issue a writ of mandamus directing the Secretary of State's ultimate decision by ordering it to reject the CFMMJ petition. She would have concluded that while the Secretary of State had a clear legal duty to evaluate the ballot initiative for facial compliance with the technical formalities dictated by the Constitution, it was that decision that would then be reviewable by the Court of Appeals, as would an appeal from an action seeking declaratory relief if one or more of the parties had sought such relief.

Dickinson Wright, PLLC (by *Peter H. Ellsworth* and *Jeffrey V. Stuckey*), and *Honigman Miller Schwartz and Cohn, LLP* (by *John D. Pirich* and *Andrea L. Hansen*), for Protect MI Constitution.

B. Eric Restuccia, Deputy Solicitor General, and *Jeanmarie Miller*, *Denise C. Barton*, and *Nicole A. Grimm*, Assistant Attorneys General, for the Secretary of State.

Fraser Trebilcock Davis & Dunlap, P.C. (by *Jonathan E. Raven* and *Graham K. Crabtree*), for Citizens for More Michigan Jobs.

Amicus Curiae:

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Laura L. Moody* and *Mark G. Sands*, Assistant Attorneys General, for the Attorney General.

Before: OWENS, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

O'CONNELL, J. In this original action, plaintiff, Protect MI Constitution (PMC), seeks a writ of mandamus against defendant Secretary of State (the Secretary). PMC asks this Court to direct the Secretary to reject a ballot question petition for a constitutional amendment filed by intervening defendant Citizens for More Michigan Jobs (CFMMJ). We grant the requested relief.

I. INTRODUCTION

CFMMJ is a ballot question committee that collected more than 500,000 petition signatures for a constitutional amendment proposal to be placed on the November 2012 general election ballot. The CFMMJ proposal would amend art 4, § 41 of the Michigan Constitution and expand casino gaming throughout the state. The proposal would allow a fourth casino in Detroit and seven other casinos at specific locations. Additionally, the CFMMJ proposal addresses subjects related to casino gaming that are presently governed by the Michigan Gaming Control and Revenue Act (the Gaming Act), MCL 432.201 *et seq*., which was enacted by voter initiative in 1996. In some respects, the CFMMJ proposal directly contradicts provisions of the Gaming Act, and CFMMJ admits that its proposal would limit, suspend, or invalidate portions of the Gaming Act.

PMC is a ballot question committee, representing existing casinos, that was formed to oppose the CFMMJ proposal and challenge its eligibility for the ballot. PMC claims that the proposal would amend the Gaming Act without following the constitutional procedures in Const 1963, art 2, § 9 for amending a voter-initiated law, or the constitutional procedures in Const 1963, art 4, §§ 24 and 25, requiring a title and republication of the statute to alter, revise, or amend an existing law. PMC also asserts that the CFMMJ petition impermissibly advances more than one purpose, and that its purpose is incapable of expression in 100 or fewer words.

PMC seeks a writ of mandamus from this Court directing the Secretary to stop the canvass and to refrain from taking any action to place the CFMMJ proposal on the ballot. The Attorney General has filed an amicus brief supporting PMC's position.[1]

This case presents an issue of first impression. We are asked to examine the process that the constitution requires for placing before the voters a proposed constitutional amendment that would alter specific provisions of a voter-initiated law. Our constitution sets forth separate and distinct procedures for amending the constitution, amending a voter-initiated law, and revising or altering a law. Michigan case law has not addressed whether the constitutional requirements for altering or amending a voter-initiated law must be satisfied when a petition for a constitutional amendment proposes a change in that law. We hold that Const 1963, art 4, § 25, which provides that a law may not be

[1] We granted the motion of the Attorney General to file an amicus curiae brief. *Protect MI Constitution v Secretary of State*, unpublished order of the Court of Appeals, entered August 3, 2012 (Docket No. 311504).

altered, revised, or amended without a republishing of the affected statutory language, applies to the CFMMJ petition presently before us. We further hold that the CFMMJ petition fails to comply with the prerequisites of article 4, § 25. Accordingly, the Secretary has a clear legal duty to reject the petition.

II. BACKGROUND AND PROCEDURAL HISTORY

A. THE GAMING ACT AND CONST 1963, ART 4, § 41

In the November 1996 general election, Michigan voters approved ballot initiative "Proposal E," which allowed the establishment of three casinos in Detroit. Proposal E created the Michigan Gaming Control Board to regulate casino operations and imposed an 18% state wagering tax on gaming revenues. Of this tax revenue, 55% was allocated to Detroit for public safety and economic development, and 45% was allocated to the state for public education. The law became effective December 5, 1996.[2] The Legislature codified Proposal E in the Gaming Act and subsequently amended the law in 1997 by a three-fourths vote of both houses of the state legislature, as provided by Const 1963, art 2, § 9 to amend a voter-initiated law.[3]

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[2] Const 1963, art 2, § 9 provides that an initiated law becomes effective ten days after the official declaration of the vote.

[3] 1997 PA 69 defined the term "city" as a

> local unit of government other than a county which meets all of the following criteria:
>
> (*i*) has a population of at least 800,000 at the time a license is issued.
>
> (*ii*) is located within 100 miles of any other state or country in which gaming was permitted on December 5, 1996.
>
> (*iii*) had a majority of voters who expressed approval of casino gaming in the city. [MCL 432.202(*l*).]

In 2004, Michigan voters adopted a constitutional amendment to restrict the expansion of legalized gaming by requiring voter approval for certain expansions. Article 4, § 41 of the Constitution presently provides:

> The legislature may authorize lotteries and permit the sale of lottery tickets in the manner provided by law. No law enacted after January 1, 2004, that authorizes any form of gambling shall be effective, nor after January 1, 2004, shall any new state lottery games utilizing table games or player operated mechanical or electronic devices be established, without the approval of a majority of electors voting in a statewide general election and a majority of electors voting in the township or city where gambling will take place. This section shall not apply to gambling in up to three casinos in the City of Detroit or to Indian tribal gaming. [Const 1963, art 4, § 41.]

B. THE CFMMJ BALLOT PROPOSAL

The CFMMJ proposal would amend Const 1963, art 4, § 41. The proposed constitutional amendment would strike all of the existing language of § 41 *except* the first sentence, "The Legislature may authorize lotteries and permit the sale of lottery tickets in any manner provided by law." The CFMMJ proposal[4] would add language to § 41 to allow casino gaming in eight locations in the state, providing in part:

> The Legislature may authorize lotteries and permit the sale of lottery tickets in any manner provided by law. In addition, for the purpose of Michigan employment opportunities and economic development, as well as funding for K-12 schools, police and fire services, and road construction and repair, casino gaming shall be permitted in the following locations throughout the State of Michigan:

[4] The CFMMJ proposal is written in all capital letters in the petition. However, for ease of reading it is reproduced in this opinion in lower case letters.

> In the City of Detroit, in addition to the three existing Casinos in that city, on [certain designated properties].

The proposed amendment provides the legal descriptions of parcels for the potential location of a new Detroit casino. It also authorizes seven new casinos outside Detroit and provides the legal descriptions of sites in Clam Lake Township in Wexford County, DeWitt Township in Clinton County, Pontiac in Oakland County, Clinton Township in Macomb County, Birch Run Township in Saginaw County, Grand Rapids in Kent County, and Romulus in Wayne County.

The Gaming Act allows only three casinos in Detroit. MCL 432.206(3). In addition to authorizing new casinos, the CFMMJ proposal contains several provisions that are different from, and in some places directly contrary to, various provisions in the Gaming Act. For example:

(1) The Gaming Act defines "casino" as "a building in which gaming is conducted." It defines "gaming" as "to deal, operate, carry on, conduct, maintain or expose or offer for play any gambling game or gambling operation." MCL 432.202(g) and (x).

The CFMMJ proposal uses the term "casino gaming," which it defines as "gambling in each and all forms now and hereafter authorized within the state of Michigan and by federal law. The term 'casino' means the facility in which actual gaming activities are conducted."

(2) The Gaming Act imposes an 18% wagering tax on the adjusted gross receipts from casinos. MCL 432.212(1).

The CFMMJ proposal would impose a 23% wagering tax on the casinos' adjusted gross receipts.

(3) The Gaming Act allows a city to impose a municipal services fee on the casino operator (licensee) that is

"equal to the greater of 1.25% of adjusted gross receipts or $4,000,000.00 in order to assist the city in defraying the cost of hosting casinos." MCL 432.213(1).

The CFMMJ proposal would eliminate the ability of cities to impose municipal services fees and other assessments related to gaming. The language of the proposed amendment to Const 1963, art 4, § 41 includes:

> No other taxes, fees, assessments or costs of any kind related directly to gaming or wagering shall be imposed upon a casino subject to the wagering tax described in this section, except for reasonable regulatory fees imposed by the State of Michigan for a license to operate the casino or for fines and penalties assessed by the State of Michigan for conduct prohibited by Michigan law.

(4) The Gaming Act allocates 55% of the wagering tax revenues to specified uses within the city where a casino is located and 45% of the wagering tax revenues to fund state public education. MCL 432.212(3).

The CFMMJ proposal would reallocate the wagering tax revenues. The taxes from Detroit casinos would be allocated as follows: 60% of the wagering tax revenues would fund police and fire services in Detroit, 20% would fund K-12 schools throughout the state, and 20% would fund road repairs and construction throughout the state. For wagering tax revenues generated by casinos outside Detroit, 30% of the revenues would be distributed to the state to fund K-12 public schools, 20% of the revenues would be distributed directly to all municipalities throughout the state to fund police and fire services, 20% would be distributed directly to the municipality where the casino is located, 20% to the county where the casino is located, 5% to the state to fund road repair and construction, and 5% to the state to fund gambling-addiction programs.

(5) The Gaming Act requires casinos to pay for all the state's "regulatory and enforcement costs, compulsive gambling programs, casino-related programs and activities, casino-related legal services provided by the attorney general, and the casino-related expenses of the department of state police." MCL 432.212a(1).

As stated, the CFMMJ proposal would prohibit other taxes, fees, assessments or costs of any kind related directly to gaming or wagering from being imposed on a casino, "except for reasonable regulatory fees imposed by the State of Michigan for a license to operate the casino" and fines or penalties for wrongful conduct.

(6) The Gaming Act governs the application procedure for casino licenses. It requires certain disclosures, criminal background and financial information, and other information that must be provided to (and reviewed and investigated by) the Gaming Control Board. MCL 432.205; MCL 432.206.

The CFMMJ would authorize the Gaming Control Board to establish rules for casino licensing. The proposed amendment does not require disclosure of investors or background checks of employees.

(7) The Gaming Act provides that "[a]lcoholic beverages shall only be sold or distributed in a casino pursuant to the Michigan liquor control act." MCL 432.210.

The CFMMJ proposal entitles all casinos to liquor licenses: "All of the casinos authorized by this section shall be granted liquor licenses issued by the State of Michigan to serve alcoholic beverages on the premises."

(8) As a condition for eligibility to apply for a casino license, the Gaming Act requires an applicant to have "entered into a certified development agreement with the city where the local legislative body enacted an ordinance approving casino gaming." MCL 432.206(1)(b). Applicants

must submit the required development agreements and documents with their applications. MCL 432.205(3).

The CFMMJ proposal does not require development agreements. To the extent that such agreements would impose fees or assessments by the city related to gaming, they would be prohibited.

C. PMC'S REQUEST TO THE SECRETARY TO REJECT THE CFMMJ PETITION

CFMMJ submitted its petition on June 26, 2012, to the Secretary for placement on the November ballot. In a July 17, 2012, letter to the Secretary, counsel for PMC urged the Secretary to determine that the CFMMJ proposal is ineligible for the ballot. PMC advanced three reasons in support of its position: (1) a single ballot proposal may not be used to amend both the constitution and an initiated law; (2) a ballot proposal that would amend an initiated law must comply with Const 1963, art 2, § 9; and (3) because the CFMMJ ballot proposal would amend the Gaming Act, the petition must have a title stating that objective and inform voters of the proposal's effect on the initiated law by republishing the Gaming Act, in accordance with Const 1963, art 4, §§ 24 and 25.

The Director of Elections responded that no clear legal duty exists on the part of the Secretary "to decide whether a ballot question is constitutional." The Secretary notified the Board of State Canvassers of the filing of the CFMMJ petition, and the Board began its canvass of the petition to determine the validity and sufficiency of the petition signatures pursuant to Const 1963, art 12, § 2.[5]

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[5] MCL 168.477(1) requires the Board to certify the petition as sufficient or insufficient at least two months before the general election, which in this case is September 7, 2012. When PMC filed its complaint for

III. THE COMPLAINT FOR MANDAMUS

PMC asks this Court to direct the Secretary to reject the petition. PMC claims that although the CFMMJ petition purports only to amend article 4, § 41 of the state constitution, the proposal also amends several provisions of the voter-initiated Gaming Act without complying with the constitutional procedures in art 2, § 9 for doing so. Additionally, the petition is silent about the proposed constitutional amendment's effects on the Gaming Act. PMC contends that the proposal is ineligible for the ballot because the CFMMJ petition does not comply with the title and notice requirements of Const 1963, art 4, §§ 24 and 25 for altering, revising, or amending a law. PMC characterizes the CFMMJ proposal as an attempt to surreptitiously amend the Gaming Act by constitutional amendment, thereby circumventing the constitutional requirements for altering or amending a statute.

The Secretary answers that she has no legal duty to review the CFMMJ petition to determine whether it meets the constitutional prerequisites for acceptance and placement on the ballot. The Secretary maintains that determining the procedural constitutionality of the CFMMJ petition is a discretionary task that is outside the scope of her statutory responsibilities and authority. She also states that any such duty, if it exists, would not be ministerial in nature and therefore would not be a proper subject for mandamus relief.[6]

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mandamus, the CFMMJ petition was before the Board of State Canvassers, and the Board's decision regarding the sufficiency of the petition was pending.

[6] The Secretary takes no position regarding the merits of PMC's allegations regarding the constitutional validity of the CFMMJ proposal, but she recognizes her ministerial duty to act in accordance with this Court's determination whether the proposal meets the constitutional prerequisites for acceptance.

CFMMJ intervened.[7] CFMMJ challenges PMC's standing to bring this mandamus action and the ripeness of this case for decision. With respect to the merits of the complaint, CFMMJ argues that its proposal seeks only to amend the constitution, and that CFMMJ has complied with the requirements of Const 1963, art 12, § 2 for doing so. CFMMJ concedes that the proposed constitutional amendment will limit or suspend some provisions of the Gaming Act and will impact the application and the enforcement of the Gaming Act. But CFMMJ maintains that the proposed constitutional amendment will not amend the Gaming Act in any way because the language of the Gaming Act will remain unchanged. CFMMJ argues that the procedural requirements for amending a statute are inapplicable because its proposal seeks to amend the constitution.

The Attorney General urges this Court to grant mandamus relief and to order the Secretary to refrain from placing the CFMMJ proposal on the ballot. The Attorney General maintains that a single ballot proposal cannot be used to amend both a voter-initiated law and the constitution. The Attorney General argues that CFMMJ's compliance only with Const 1963, art 12, § 2 regarding publication of the constitutional provision that would be changed by the proposed constitutional amendment leaves voters uninformed about the effect that the proposal would have on the voter-initiated Gaming Act. The Attorney General argues that alteration or revision of the Gaming Act, which the CFMMJ proposal would affect, requires a title and publication of the affected provisions under Const 1963, art 4, §§ 24 and 25.

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[7] We granted CFMMJ's motion to intervene. *Protect MI Constitution v Secretary of State*, unpublished order of the Court of Appeals, entered August 2, 2012 (Docket No. 311504).

IV. DISCUSSION AND ANALYSIS

A. JURISDICTION

This Court has jurisdiction over an original action for mandamus against a state officer. MCR 7.203(C)(2); MCL 600.4401(1). The Secretary is a state officer for purposes of mandamus. *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282; 761 NW2d 210, aff'd in part 482 Mich 960 (2008). "Mandamus is the appropriate remedy for a party seeking to compel action by election officials." *Id*. at 283.

B. STANDARD FOR MANDAMUS

A writ of mandamus is an extraordinary remedy. *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 366; 820 NW2d 208 (2012). The plaintiff must show that (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform the requested act, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. *Id*. at 366-367. See also *White-Bey v Dep't of Corrections*, 239 Mich App 221, 223-224; 608 NW2d 833 (1999). An act is ministerial if it is "prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Citizens Protecting Michigan's Constitution*, 280 Mich App at 286, quoting *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 439; 722 NW2d 243 (2006) (quotation marks omitted).

C. STANDING

We reject CFMMJ's challenge to PMC's standing to bring this action. Michigan jurisprudence recognizes

the special nature of election cases and the standing of ordinary citizens to enforce the law in election cases. *Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 505-506; 688 NW2d 847 (2004). See also *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987) ("[I]n the absence of a statute to the contrary, . . . a private person . . . may enforce by mandamus a public right or duty relating to elections without showing a special interest distinct from the interest of the public." [Quotation marks omitted.]). The general interest of ordinary citizens to enforce the law in election cases is sufficient to confer standing to seek mandamus relief. See *Citizens Protecting Michigan's Constitution*, 280 Mich App at 282 (permitting a ballot question committee to challenge a petition).

D. RIPENESS AND THE NEED FOR A THRESHOLD DETERMINATION

Our Supreme Court has recognized that a ballot issue controversy is ripe for review when "it is not dependent upon the Board of Canvassers' counting or consideration of the petitions but rather involves a threshold determination whether the petitions on their face meet the constitutional prerequisites for acceptance." *Michigan United Conservation Clubs v Secretary of State*, 463 Mich 1009; 625 NW2d 377 (2001). See also *Citizens Protecting Michigan's Constitution*, 280 Mich App at 282-283 (rejecting a ripeness challenge that was premised on the fact that the Board had not decided whether to certify an initiative petition). PMC's complaint for mandamus requires us to make a "threshold determination" whether the CFMMJ proposal qualifies for placement on the ballot according to constitutional prerequisites. In that context and on that issue, this case is ripe for adjudication.

We emphasize that the constitutional issue before us is limited to the procedure employed by CFMMJ to alter the Gaming Act by means of a constitutional amendment and the CFMMJ proposal's eligibility for the ballot. We do not consider the constitutionality of the proposed amendment itself, which would be premature before the voters adopt the proposal. See *Leininger v Secretary of State*, 316 Mich 644, 651; 26 NW2d 348 (1947) (noting that substance of initiative petition was not being questioned in writ of mandamus); *Hamilton v Secretary of State*, 212 Mich 31, 34; 179 NW 553 (1920) (holding that issue of constitutionality of initiative petition was not ripe for review). In *Citizens Protecting Michigan's Constitution*, we adopted Justice OSTRANDER's articulation of this important distinction, first expressed in 1918 in *Scott v Secretary of State*, 202 Mich 629, 643; 168 NW 709 (1918), and reaffirmed in *Leininger*:

> In . . . *Leininger* the Court carved out an exception to the *Hamilton* rule, holding that a constitutionally fatal defect in an initiative petition supported the issuance of a writ of mandamus prohibiting the Secretary of State from transmitting the proposed law. The *Leininger* Court explained that, unlike in *Hamilton*, "[i]n the case at bar . . . we are not concerned with the question of whether the substance of the proposed law is violative of the Federal or State Constitutions. Here the question is whether the petition, in form, meets the constitutional requirement so as to qualify it for transmittal to the legislature and submission to the people." [*Leininger*, 316 Mich] at 651. On this point, the words of Chief Justice OSTRANDER in *Scott v Secretary of State*, 202 Mich 629, 643; 168 NW 709 (1918), are most instructive:
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> "Of the right of qualified voters of the State to propose amendments to the Constitution by petition it may be said, generally, that it can be interfered with neither by the legislature, the courts, nor the officers charged with any

> duty in the premises. *But the right is to be exercised in a certain way and according to certain conditions, the limitations upon its exercise, like the reservation of the right itself, being found in the Constitution*. [Emphasis added.]" [*Citizens Protecting Michigan's Constitution*, 280 Mich App at 289.][8]

The same principle applies here, making PMC's request for mandamus a proper subject for this Court's consideration. Because the challenges in this case implicate this "threshold determination" whether the petition meets the constitutional prerequisites for acceptance, this case is ripe for this Court's consideration. *Id*. at 283.

E. MINISTERIAL DUTY OR DISCRETIONARY JUDGMENT

This Court clarified the nature of the Secretary's legal duty in this context in *Citizens Protecting Michigan's Constitution*. In that original action seeking mandamus relief to keep an initiative from the general election ballot, this Court explained that it was for this Court to examine the constitutional amendment initiative and determine its eligibility for the ballot in light of constitutional prerequisites for acceptance. Once that threshold determination was made, the Secretary's task of rejecting the petition was ministerial.

In *Citizens Protecting Michigan's Constitution*, the plaintiffs sought a writ of mandamus directing the Secretary and the Board of State Canvassers to reject an initiative petition filed by the intervening defendant Reform Michigan Government Now! (RMGN). The petition proposed a single constitutional amendment for the November 2008 general election ballot that would comprehensively restructure state government. *Id*. at

[8] *Scott* and *Leininger* interpreted previous versions of our constitution.

275.[9] The plaintiffs argued that the RMGN proposal was ineligible for the ballot because its provisions amounted to a general revision of the constitution that could only be accomplished by a constitutional convention and because the proposal served more than a single purpose. *Id*. at 281-282. This Court recognized a clear legal duty of the Secretary that a writ of mandamus can enforce once the Court makes its threshold determination of constitutional compliance:

> [A]ssuming the Board and the Secretary have no clear legal duty to determine whether the RMGN initiative petition is an "amendment" to, or a "general revision" of, the constitution, or a duty to determine whether the RMGN initiative petition serves more than one purpose, then *this Court* must make the "threshold determination" that the RMGN initiative petition does not meet the constitutional prerequisites for acceptance. And, *at that point*, the Board and the Secretary have a clear legal duty to reject the RMGN petition. *In other words, in this case, our order would not enforce any duty on the part of the Board and the Secretary to make the "threshold determination" whether the RMGN initiative petition is an "amendment" or a "general revision," or whether it serves more than one purpose. Rather, our order would enforce a duty on the part of the Board and the Secretary to reject the RMGN initiative petition in light of our "threshold determination"*

[9] The proposed constitutional amendment in *Citizens Protecting Michigan's Constitution* included provisions to: modify initiative and referendum procedures, establish a new office of elections in the executive branch, freely allow absentee ballot voting, reduce the number of legislators in the state house and senate, reduce the number of appellate judgeships and Court of Appeals districts while adding circuit court judgeships, change procedures for legislative districting, reduce salaries and alter pension benefits of certain elected officials, impose limits on lobbying activities, change election procedures for selecting the governor and the lieutenant governor, make changes to the governor's and the Legislature's authority in certain matters, and replace the Judicial Tenure Commission with a new body composed of nonlawyers. *Id.* at 279-281.

> *that it does not meet the constitutional prerequisites for acceptance.* [*Id.* at 291 (some emphasis added).]

This Court concluded that the subsequent act of the Secretary in rejecting the challenged initiative petition after the Court made its threshold determination "would be ministerial in nature because it would not require the exercise of judgment or discretion." *Id.* at 291-292. Likewise, this Court must determine whether the CFMMJ petition satisfies the constitutional requirements for placement on the general election ballot. The Secretary will then have the ministerial task of rejecting the petition, or not, in accordance with this Court's decision.

F. RELEVANT CONSTITUTIONAL PROVISIONS

Among the rights that the Michigan Constitution reserves to the people of this state are the right to amend their constitution, to enact laws by initiative, and to amend initiated laws. The constitution prescribes different procedures for exercising these rights.

Const 1963, art 12, § 2 allows voters to amend the constitution by voter initiative as follows:

> Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency

> of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.
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> Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law. Copies of such publication shall be posted in each polling place and furnished to news media as provided by law.
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> The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment.
>
> If the proposed amendment is approved by a majority of the electors voting on the question, it shall become part of the constitution, and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved. If two or more amendments approved by the electors at the same election conflict, that amendment receiving the highest affirmative vote shall prevail.

Const 1963, art 2, § 9 protects the people's right to enact laws through initiative and prescribes the means for amending or repealing a voter-initiated law. Amendment or repeal of an initiated law can only be accomplished "by a vote of the electors unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature." *Id*. Article 2, § 9 provides in full:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and

the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.

No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election.

Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is receive by the legislature. If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided.

If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election. The legislature may reject any measure so proposed by initiative petition and propose a different measure upon the same subject by a yea and nay vote upon separate roll calls, and in such event both measures shall be submitted by such state officer to the electors for approval or rejection at the next general election.

Any law submitted to the people by either initiative or referendum petition and approved by a majority of the votes cast thereon at any election shall take effect 10 days after the date of the official declaration of the vote. No law initiated or adopted by the people shall be subject to the

> veto power of the governor, and *no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature.* Laws approved by the people under the referendum provision of this section may be amended by the legislature at any subsequent session thereof. If two or more measures approved by the electors at the same election conflict, that receiving the highest affirmative vote shall prevail.
>
> The legislature shall implement the provisions of this section. [Emphasis added.]

The Gaming Act does not provide other means for its amendment. Therefore, either a vote of the electorate or a three-fourths vote in each house of the legislature is required to amend the Gaming Act. Const 1963, art 2, § 9.

Clearly, Const 1963, art 2, § 9 and art 12, § 2 prescribe different procedures that must be satisfied before an initiative is submitted to the electorate, depending on the type of initiative. A legislative initiative requires petitions signed by 8% of registered electors; a constitutional amendment requires petitions signed by 10% of registered electors. Unlike a constitutional amendment proposal, a legislative initiative must be submitted to the legislature for adoption or rejection. These constitutional provisions both authorize amendment by a vote of the electors, but they set different procedures for accomplishing these different objectives.

Const 1963, art 4, § 24 mandates that a law can have only one object and must have a title that expresses its object: "No law shall embrace more than one object, which shall be expressed in its title."

The revision, alteration, or amendment of a law implicates the procedures of Const 1963, art 4, § 25. The

law as it exists must be published to show the effect of the proposed changes. Const 1963, art 4, § 25 provides:

> No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length.

This publication requirement applies to the revision or the alteration of a law by the people through the initiative process. See *Auto Club of Mich Comm for Lower Rates Now v Secretary of State (On Remand)*, 195 Mich App 613, 622-624; 491 NW2d 269 (1992) (finding that the failure to republish at length certain statutory provisions in their proposed amended forms may not be considered before the initiative is submitted to the electorate for a vote).

G. APPLICATION OF THE PREREQUISITES OF CONST 1963, ART 2, § 9

Const 1963, art 2, § 9 and Const 1963, art 12, § 2 prescribe separate procedures for amending voter-initiated laws and for amending the constitution, respectively. They are not interchangeable alternatives. These distinct procedures for different objectives must be respected. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 295. Accordingly, CFMMJ may not use a constitutional amendment under art 2, § 12 to effect an amendment of the Gaming Act. If CFMMJ seeks to amend the Gaming Act, it must satisfy the dictates of art 2, § 9.

On its face, the CFMMJ petition purports only to amend Const 1963, art 4, § 41. As required by article 12, § 2, the petition indicates the language that it proposes to strike from article 4, § 41, as well as the language that the proposed amendment would add. The petition contains no reference to the Gaming Act. Whether disclosure of the CFMMJ proposal's effects on

the Gaming Act is required depends upon whether the CFMMJ proposal is properly deemed an amendment of the Gaming Act.

We need not decide whether the CFMMJ proposal constitutes an *amendment* of the Gaming Act, thereby requiring compliance with the procedures in Const 1963, art 2, § 9 for submission to the voters. The republication requirement of Const 1963, art 4, § 25 applies not only to efforts to *amend* an existing law, but also to proposals that would revise or alter a law. Although similar, principles of construction require us to give meaning to each term, "revise," "alter," and "amend," lest any one of them be rendered surplusage or nugatory. *Apsey v Mem Hosp*, 477 Mich 120, 127; 30 NW2d 695 (2007). To the extent that the CFMMJ proposal revises or alters the Gaming Act, it must comply with Const 1963, art 4, § 25.

H. APPLICATION OF CONST 1963, ART 4, § 25

As set forth, Const 1963, art 4, § 25 provides that "[n]o law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length." This notice requirement has a long history and its significance is deeply rooted in this state's constitutional jurisprudence. Const 1963, art 4, § 25 was also article 4, § 25 of the 1850 Constitution,[10]

[10] Article 4, § 25 of the Constitution of 1850 was worded and punctuated slightly differently than in the current version: "No law shall be revised, altered or amended by reference to its title only; but the act revised, and the section or sections of the act altered or amended shall be reenacted and published at length." "Except for some punctuation and some rearrangement of words in the latter half of the provision, this language has continued through to this date (also see 1908 Cont art 5, § 21, § 22)." *Advisory Opinion re Constitutionality of 1972 PA 294*; 389 Mich 441, 469-470; 208 NW2d 469 (1973).

under which our Supreme Court decided *Mok v Detroit Bldg & Savings Ass'n No 4*, 30 Mich 511 (1875). *Alan v Wayne Co*, 388 Mich 210, 273; 200 NW2d 628 (1972). Justice COOLEY wrote of article 4, § 25 in *Mok*:

> No one questions the great importance and value of the provision, nor that the evil it was meant to remedy was one perpetually recurring, and often serious. Alterations made in the statutes by mere reference, and amendments by the striking out or insertion of words, without reproducing the statute in its amended form, were well calculated to deceive and mislead, not only the legislature as to the effect of the law proposed, but also the people as to the law they were to obey, and were perhaps sometimes presented in this obscure form from a doubt on the part of those desiring or proposing them of their being accepted if the exact change to be made were clearly understood. [*Mok*, 30 Mich at 515-516.]

In *Advisory Opinion re Constitutionality of 1972 PA 294*; 389 Mich 441; 208 NW2d 469 (1973), our Supreme Court reiterated the import of art 4, § 25 in Constitution 1963. The Court interpreted art 4, § 25 in the context of addressing the constitutionality of an amendment to the no-fault act. The Court recognized the significant purpose of § 25 to provide notice to the public of the full effects of a proposed amendment:

> The language of § 25 is quite clear. It says succinctly and straightforwardly that no law (meaning statutory enactment) shall be revised, altered or amended by reference to its title only. The constitutional language then proceeds to state how it shall be done (*i.e.* the section[s] of the act in question shall be amended by reenacting and republishing at length).
>
> There are only two sentences in § 25. Although the second word is "law", it is obvious from the reading of the entire section that "law" means act or section of an act. Section 25 is worded to prevent the revising, altering or amending of an act by merely referring to the title of the

> act and printing the amendatory language then under consideration. If such a revision, alteration or amendment were allowed, the public and the Legislature would not be given notice and would not be able to observe readily the extent and effect of such revision, alteration or amendment. [*Id.*, 389 Mich at 470.]

Looking to precedent, the *Advisory Opinion* Court quoted Justice COOLEY in *People v Mahaney*, 13 Mich 481 (1865):

> "This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that the legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws." (p 497.)
>
> This citation indicates that another reason for the language in § 25 is to require that notice be given to the Legislature and the public of what is being changed and the content of the act as revised, altered or amended. . . .
>
> * * *
>
> "An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was introduced into the law, and the constitution wisely prohibited such legislation." [*Advisory Opinion*, 389 Mich at 472-473, quoting *Mahaney*, 13 Mich at 497.]

The effects of the proposed constitutional amendment on the Gaming Act are not minor. If adopted, the CFMMJ proposal will significantly limit, suspend, or invalidate specific provisions of the statute. Among other changes to the Gaming Act, the constitutional

amendment will authorize more casinos than the Gaming Act allows, increase the wagering tax rate, change the statute's allocation of tax revenues, remove the Gaming Act's requirement that casinos' liquor licenses be issued according to the liquor control act and instead mandate such licenses, and alter the duties of the Michigan Gaming Control Board. If Michigan voters are presented with and adopt the CFMMJ proposal, the constitutional amendment will supersede numerous provisions of the Gaming Act because the authority of a constitutional amendment is superior to statutory authority. See *Dunn v Dunn*, 105 Mich App 793, 805; 307 NW2d 424 (1981) (noting that when statutes conflict with our constitution, the latter controls) (KALLMAN, J., concurring). Although the CFMMJ proposal does not amend the Gaming Act by changing its language, the proposal nonetheless thoroughly revises the Act.

If the CFMMJ proposal is allowed to be placed on the ballot, not only would it run afoul of the republication requirement of Const 1963, art 4, § 25, but it would foster the harm that § 25 seeks to prevent. The constitutional amendment would substantially change the Gaming Act, yet the public "would not be given notice and would not be able to observe readily the extent and effect of such revision, alteration, or amendment." *Advisory Opinion*, 389 Mich at 470.

The CFMMJ petition does not publish at length the sections of the Gaming Act that the proposed constitutional amendment would alter as required by Const 1963, art 4, § 25. The petition contains no reference to the Gaming Act. The petition heading states only that it proposes a constitutional amendment; the petition discloses nothing about the substantial changes to the application and enforcement of the Gaming Act that would result from adoption of the proposal. Indeed, the

petition gives no indication to voters that the CFMMJ proposal would alter parts of the voter-initiated Gaming Act in any way. Because the proposed amendment would directly alter provisions of the Gaming Act without republishing the affected provisions, the CFMMJ proposal fails to satisfy Const 1963, art 4, § 25. This failure makes it ineligible for placement on the ballot.[11]

We neither address nor consider the wisdom of the CFMMJ proposal. Whether the goals of the CFMMJ proposal are desirable, or whether its changes to the Gaming Act are sound policy, are not before us. We simply apply the procedural requirements that the constitution demands.

Our decision today gives effect to the publication requirement of Const 1963, art 4, § 25 and furthers its purpose of ensuring that the public is informed of the effects of proposed changes to existing law. By giving effect to article 4, § 25, the public will be assured of the opportunity to "mak[e] the necessary examination and comparison" and "to become apprised of the changes made in the laws." *Advisory Opinion*, 389 Mich at 472-473. This constitutional safeguard is as crucial to the people's exercise of their right to amend their constitution, perhaps more so, as it is to their use of the initiative to enact or amend existing law.

We grant the relief requested in the complaint for a writ of mandamus, and we have concurrently issued an order directing the Secretary to reject the CFMMJ petition and to disallow the proposal from the ballot.

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[11] The Attorney General stated at oral argument that amending both the constitution and an initiated law would require separate petitions. Whether two petitions would be necessary to accomplish CFMMJ's casino gaming expansion goals, or whether one petition would suffice if that petition republished both the Gaming Act provisions and constitutional provisions that the CFMMJ proposal would affect, is not before us. Accordingly, we leave that question for another day.

No costs, a public question being involved. We do not retain jurisdiction. This opinion is to have immediate effect, MCR 7.215(F)(2).

OWENS, P.J., concurred with O'CONNELL, J.

RONAYNE KRAUSE, J. *(concurring in part and dissenting in part).* This is another unfortunate case throwing into sharp relief two longstanding problems with the Michigan referendum process: first, poor drafting can preclude the people of this state from being able to express their will at the polls; and second, the Secretary of State needs clearer authority explicitly stating its duties, if any, to filter ballot proposals that do not conform to the requirements of our Constitution. I do not take issue with the majority's conclusion that the ballot initiative at issue in this matter does not, in fact, conform to the requirements of our Constitution for presentation to the voters. I also agree that the Secretary of State has a clear legal duty to evaluate ballot proposals for such compliance. To the extent the writ of mandamus issued by this Court directs the Secretary of State to perform her duty, I concur with it. However, because I believe that this Court lacks sufficiently clear authority granting it the power to make the Secretary of State's decision for her under these circumstances, I respectfully dissent to the extent that the writ of mandamus dictates the Secretary of State's ultimate decision.[1]

As the majority states in greater—and accurate—detail, this is an original mandamus action filed in this Court by Protect MI Constitution (PMC), an entity that seeks to preclude a ballot initiative from being put to

[1] In addition, I specifically concur in parts IV(C) and (D) of the majority's opinion, rejecting standing and ripeness challenges to the instant appeal.

the voters. The ballot initiative in question, sponsored by intervenor Citizens For More Michigan Jobs (CFMMJ), would in broad terms amend the Michigan Constitution to permit additional casinos to operate in this state. PMC asserts that the ballot initiative would not merely amend the Constitution, but would also have the effect of modifying significant portions of the Michigan Gaming Control and Revenue Act (the Gaming Act), MCL 432.201 *et seq*., which was passed by voter initiative in 1996.[2] Defendant, the Secretary of State, argues that a writ of mandamus should not issue because she has no clear legal duty to examine ballot initiatives for compliance with Constitutional prerequisites.

As the majority states, a writ of mandamus "is the appropriate remedy for a party seeking to compel action by election officials," and the Secretary of State is a state officer subject to a writ of mandamus issued by this Court. *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282-283; 761 NW2d 210 (2008). Indeed, it has long been established that while the Governor might be immune to mandamus, other executive officers, including department heads, are not. See *People ex rel Sutherland v Governor*, 29 Mich 320, 326-331 (1874). However, issuance of mandamus is only proper if, among other things, "the defendant has the clear legal duty to perform the act requested," "the act is ministerial," and "no other remedy exists that might

[2] Under the procedural posture of this case, I would decline to address whether the proposed ballot initiative actually would impermissibly alter provisions of the Gaming Act, and therefore violates the prerequisites of Const 1963, art 4, §§ 24 and 25. However, while irrelevant to the analysis in which I would engage, I note as an aside that I do agree with the majority that it does so, and so I take no issue with parts IV(F), (G), and (H) of the majority's opinion. I merely would not reach them at this time.

achieve the same result." *Citizens Protecting Michigan's Constitution*, 280 Mich App at 284. The Secretary of State argues that evaluating a ballot proposal for constitutionality entails a great deal of discretion, and she has no legal duty to make that analysis.

I am not convinced that the act to be performed—examining an initiative proposal for compliance with constitutional prerequisites—is not ministerial. This Court has explained that an act is ministerial if it is "prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Id.* at 286, quoting *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 439; 722 NW2d 243 (2006) (quotation marks and citations omitted). However, I do not believe that to mean that the act must be so rote or devoid of personal thought that it could literally be performed by a computer. See *Wayne Co v State Treasurer*, 105 Mich App 249, 251; 306 NW2d 468 (1981) (noting that the legal duty to act must usually be a specific act of a ministerial nature, although mandamus may occasionally be granted when the act to be compelled is discretionary). So long as any discretion to be exercised is in the *execution* of the act, and the act *itself* is otherwise mandated, mandamus may lie. See *Mich State Dental Society v Secretary of State*, 294 Mich 503, 516-517, 519-520; 293 NW 865 (1940) (holding that the Secretary of State's duties, which are only ministerial even though the performance thereof may entail some exercise of discretion and judgment, include the right to make a facial evaluation of obviously fake names on a petition). This Court will order mandamus when a state officer's action is so capricious and arbitrary that it evidences a total failure to exercise discretion. See *Bischoff v Wayne Co*, 320 Mich 376, 385-387; 31 NW2d 798 (1948).

The critical problem that I perceive with the instant action is that, as I understand the law, a writ of mandamus cannot issue unless there *already* exists a clear legal duty that a defendant is shirking. Obviously, the Secretary of State would be obligated to comply with any valid court order, including a writ of mandamus issued by this Court, and the Secretary of State does not in any way contest that. However, this Court cannot *create* a clear legal duty of the sort that would support issuance of mandamus *by* issuing mandamus. Doing so is bootstrapping of the kind our jurisprudence has always frowned upon. The Secretary of State poses a Catch-22: if, indeed, she has no clear legal duty in the first place to make the instant determination on her own, I do not believe this Court can *create* that duty out of thin air by issuing a writ of mandamus.

Unfortunately, I find no case law or other authority unambiguously setting forth a clear legal duty on the Secretary of State's part to evaluate a ballot proposal for compliance with the Constitutional provisions at issue here. In *Citizens Protecting Michigan's Constitution*, this Court issued a writ of mandamus directing the Secretary of State to reject a sweeping and grossly noncompliant rewrite of the Constitution that was masquerading as a mere amendment. However, this Court did not decide that the Secretary of State had a clear legal duty to do so, but rather assumed that the Secretary did. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 286-292. Similarly, in *MUCC v Secretary of State (After Remand)*, 464 Mich 359; 630 NW2d 297 (2001), our Supreme Court issued mandamus directing the Secretary of State to reject a petition for referendum but offered no analysis whatsoever as to the existence of a duty. Almost every justice in *MUCC* wrote a separate opinion, none of which discussed mandamus in any way.

It appears to me that this Court in *Citizens Protecting Michigan's Constitution* really determined that the Secretary of State would have a clear legal duty to comply with what was effectively a declaratory judgment. I believe that to be accurate, so far as it goes: if a court were to issue a declaratory judgment that a given ballot initiative is impermissible for presentation to the voters, for example because, as here, it does not comply with the constitutional prerequisites, then it is very nearly, if not actually, axiomatic that the Secretary of State would have a clear legal duty to refuse to present that initiative to the voters. However, this Court does not, as far as I am aware, have jurisdiction to entertain original actions for declaratory judgment. MCR 7.203(C).[3] This Court could grant "any judgment . . . as the case may require" pursuant to MCR 7.216(A)(7), which would impliedly include granting declaratory relief. However, that does not appear to have occurred. Mandamus and declaratory judgments are not exactly the same thing; and because this Court does not appear to have the jurisdiction to entertain an original action for declaratory relief, I would not consider one.

Our Supreme Court has, in the past, found a clear legal duty on the part of the Secretary of State, leading to writs of mandamus, to evaluate ballot proposals for facial compliance with constitutionally mandated technical requirements. In *Leininger v Secretary of State*, 316 Mich 644, 651-656; 26 NW2d 348 (1947), our Supreme Court explicitly established that the Secretary of State has a clear legal duty to determine whether petitions were in the proper constitutionally required form for transmit-

[3] Obviously, it would be possible to establish that this Court may entertain an original action for declaratory relief in the specific context of determining whether ballot initiatives are permissible, pursuant to MCR 7.203(C)(5). To the best of my knowledge, this has not occurred.

tal to the Legislature. *Leininger* is of dubious direct validity today, however, because at the time, article V, § 1 of the 1908 Constitution, as amended by 1941 Joint Resolution 2, imposed an *explicit* duty on the Secretary to do so. *Leininger*, 316 Mich at 655. However, *Leininger* relied primarily on another case that predated 1941 JR 2, and it noted that the Constitution merely "now makes express the duty which this Court had theretofore held rested upon the Secretary of State." *Leininger*, 316 Mich at 655.

The prior case is *Scott v Secretary of State*, 202 Mich 629; 168 NW 709 (1918). Although *Scott* predates 1941 JR 2, it was decided after the 1908 Constitution was amended to provide for a referendum process by 1913 Concurrent Resolution 4.[4] The 1913 to 1941 version of Const 1908, art V, § 1 did not provide the explicit directive to the Secretary to "determine[]that the petition is legal and in proper form and has been signed by the required number of qualified and registered electors," as it did after 1941 JR 2, as noted in *Leininger*. Rather, it specified only that "[u]pon receipt of any initiative petition, the Secretary of State shall canvass the same to ascertain if such petition has been signed by the requisite number of qualified electors" and transmit it to the Legislature if so. 1913 CR 4. *Scott* observed that the same constitutional provision required all petitions to contain "the full text of the amendment so proposed," and on that basis, it held that "such petition" had to be defined as one "conforming to the constitutional mandate." *Scott*, 202 Mich at 644. If a petition did not satisfy the constitutional requirements, it was

[4] The original, "as ratified" version of Const 1908, art V, § 1 stated only that "[t]he legislative power is vested in a senate and house of representatives," and this original version of that section is now found at Const 1963, art 4, § 1.

therefore the duty of the Secretary to reject it. *Scott*, 202 Mich at 643-646; see also, *Hamilton v Secretary of State*, 212 Mich 31, 38-40; 179 NW 553 (1920) (discussing *Scott*).

I would find that, while Michigan has a new Constitution, the principles discussed in *Scott* and expounded upon in *Leininger* are still valid and binding. I would therefore explicitly hold that the Secretary of State has a clear, unambiguous, affirmative legal duty to evaluate ballot initiatives for facial compliance with the technical formalities dictated by the Constitution. However, I find authority only supporting the bare obligation by the Secretary of State to make that evaluation. Should the Secretary of State find that the ballot proposal is or is not compliant, and thereby decide whether to place it on the ballot, the Secretary of State's decision will then be reviewable by an appeal to the courts. See *Leininger*, 316 Mich at 652, citing *Hamilton*, 212 Mich at 38, and *Thompson v Secretary of State*, 192 Mich 512, 523-524; 159 NW 65 (1916). Alternatively, one or more of the parties should have commenced an action seeking declaratory relief.

I recognize that there are time constraints on the subject matter of this case. However, I do not believe that those time constraints change the law. I note that at oral argument, the Solicitor General agreed on the record that the Secretary of State is obligated to make this decision, but asked this Court to make that decision *for* the Secretary of State because of those time constraints. I do not believe that in the absence of any clear authority to the contrary, such as that from our Legislature or from our Supreme Court, this Court may do so until such time as the Secretary of State has made a decision.[5] Indeed, at oral

[5] Furthermore, I am not persuaded that the time constraints are as dire as suggested. The courts may conclude that legislation is impermissible *after* voting has occurred, and the people may well vote against this

argument, the possibility of clarifying legislation was discussed, and I would very much like to have such clear authority on which to rely.[6] However, in the absence thereof, I can only surmise the courts could address the issue through a complaint for declaratory judgment.

Where the majority and I part ways is that I would issue a writ of mandamus directing the Secretary of State to make this decision; the majority would relieve the Secretary of her duty and issue a writ of mandamus making this decision for her. I believe that the Secretary of State has a clear legal duty, independent of any decision or judgment from this Court, to evaluate ballot initiatives for facial compliance with the procedural requirements specified by the Constitution, and we can therefore issue a writ of mandamus requiring the Secretary of State to carry out that duty. If a court, such as this Court, issues a declaratory judgment that a ballot initiative is or is not constitutionally infirm, *then* the Secretary of State has a clear legal duty to take a particular action to accept or reject the initiative and present it to the voters. But I believe the majority's approach conflates the matter and impermissibly treats this case as not only an original action for mandamus, but also an original action for declaratory judgment. I appreciate the majority's concern, given the nature of the ballot initiative at issue, but in the absence of a clearer articulation of this Court's authority and the Secretary of State's duty from our

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particular initiative. In any event, PMC candidly points out, and I agree, that no matter what this Court does, at least one party *will* seek leave to appeal to our Supreme Court. It is my hope and my respectful request that if our Supreme Court chooses to review this matter, that it take the opportunity to benefit the bench, the bar, the Secretary of State, and the people of this state by clarifying the concerns I have raised.

[6] As noted earlier, I agree with the majority's analysis of the ballot initiative's constitutional infirmities, but I am unsure that this Court may properly reach that analysis under the instant procedural posture of this case.

Supreme Court or from the Legislature, I would only direct that the Secretary of State engage in the analysis that she was obligated to engage in from the outset.

TMW ENTERPRISES INC v DEPARTMENT OF TREASURY

Docket No. 302870. Submitted April 10, 2012, at Lansing. Decided August 14, 2012, at 9:05 a.m. Leave to appeal denied, 493 Mich 952.

TMW Enterprises Inc., a subchapter S corporation, brought an action in the Court of Claims against the Department of Treasury, seeking a refund of single business tax, interest, and a penalty fee that it had paid under protest when defendant determined that plaintiff's gain from the sale of an asset was subject to taxation under the former Single Business Tax Act (SBTA), MCL 208.1 *et seq*., and did not qualify for a casual-transaction exclusion under the act. The Court of Claims, Paula J. M. Manderfield, J., determined that former MCL 208.3(3) was ambiguous and that an S corporation was not a corporation within the meaning of the term "corporation" as used in former § 3(3) and that an S corporation therefore could qualify for a casual-transaction exclusion. Defendant appealed the judgment awarding plaintiff a refund. The Court of Appeals, FORT HOOD, P.J. and CAVANAGH and K. F. KELLY, JJ., reversed in part and remanded for a new hearing, concluding that S corporations were corporations within the meaning of former § 3(3) and as a result were not entitled to the casual-transaction exclusion. 285 Mich App 167 (2009). On remand, the Court of Claims determined that plaintiff was entitled to a refund of most of the amount paid, concluding that only that portion of plaintiff's gain that represented built-in gains or excess passive income was subject to tax. Defendant again appealed.

The Court of Appeals *held*:

1. On remand a trial court possesses the authority to take any action that is not inconsistent with the opinion of the appellate court. In this case, the only conclusion reached in the prior Court of Appeals opinion was that S corporations were corporations within the meaning of former § 3(3) and as a result were not entitled to the casual-transaction exclusion. As long as the Court of Claims followed that principle of law on remand, it could take any action necessary to decide the case including revisiting the calculation of plaintiff's tax liability.

2. The SBTA imposed a tax on a taxpayer's adjusted tax base, and if a person was a corporation, its business income was its

federal taxable income, which in turn was also its tax base. In this case, plaintiff was an S corporation with no federal taxable income except for its built-in gains and excess passive income. Therefore, the trial court correctly concluded that only the amount of those built-in gains and excess passive income constituted business income under the SBTA and that plaintiff thus owed single business tax only on that amount. S corporations are corporations and had to be treated like any other corporation under the SBTA without regard to whether that treatment resulted in tax liability.

Affirmed.

Honigman Miller Schwartz and Cohn LLP (by *June Summers Haas*) for TMW Enterprises Inc.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Michael R. Bell*, Assistant Attorney General, for the Department of Treasury.

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM. This tax dispute is before this Court for a second time. In an earlier appeal, this Court ruled that an S corporation was a corporation for purposes of former MCL 208.3(3) and, as such, plaintiff was not entitled to claim a "casual transaction" exclusion under former MCL 208.3(2) and former MCL 208.4(1) of the now repealed Single Business Tax Act (SBTA). *TMW Enterprises Inc v Dep't of Treasury*, 285 Mich App 167; 775 NW2d 342 (2009). This Court remanded "for further proceedings consistent with this opinion." *Id.* at 180.

The facts of the underlying transaction were fully discussed in the earlier opinion and need not be repeated here. The tax liability at issue arises from the sale of assets by plaintiff to a competitor in 1995, giving rise to realizing a gain of $237,059,325. Plaintiff had excluded the gain from its single business tax return for

that year, taking the position that it was entitled to the casual-transaction exclusion under the SBTA. Defendant disagreed, assessing over $1,000,000 in taxes, penalties, and interest. Plaintiff paid the assessment under protest and brought an action in the Court of Claims seeking a refund. Although plaintiff prevailed in the Court of Claims, defendant prevailed on appeal.

On remand, the Court of Claims determined that plaintiff was entitled to a refund of most of the amount paid. Specifically, the Court of Claims concluded that only that portion of the gain that represented built-in gains or excess passive income, $589,879 of plaintiff's gain from the 1995 transaction, was subject to tax. Defendant appeals that decision.

Defendant first argues that it was improper for the issue of the calculation of plaintiff's tax liability to be revisited on remand. We disagree. Defendant argues that the trial court on remand only had the authority to take action consistent with our prior opinion. This is correct, though it would be more accurate to phrase the principle in the affirmative of what the trial court can do on remand. On remand, "the trial court possesses the authority to take any action which is not inconsistent with the opinion of the appellate court." *VanderWall v Midkiff*, 186 Mich App 191, 196; 463 NW2d 219 (1990). At no point in this Court's prior opinion was the amount of plaintiff's taxable income determined nor the amount of tax owed established. Rather, the only thing that this Court concluded in the prior opinion was that S corporations are corporations for SBTA purposes and, as such, are not entitled to claim the casual-transaction exclusion. *TMW*, 285 Mich App at 179.[1] The trial court

[1] This Court also directed the trial court to revisit on remand the negligence penalty issue because the trial court's erroneous holding on the casual-transaction issue necessarily meant that it had erred in its

was required to follow that principle of law on remand. *City of Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). But as long as it did so, the trial court had the authority to take any action necessary on remand as long as that action was consistent with our prior opinion.

Indeed, arguably not only was the trial court free to revisit the calculation issue, but it was obligated to do so inasmuch as this Court had vacated the trial court's original decision. *TMW*, 285 Mich App at 179 n 8. With the trial court's original decision vacated, it was necessary for it to enter a new decision. And the only thing our prior decision obligated the trial court to do was to treat plaintiff like any other corporation for purposes of calculating its obligations under the SBTA, which the trial court did.

In sum, in our prior opinion, this Court did not determine the amount of tax owed by plaintiff nor the amount of plaintiff's taxable income. Moreover, nothing in our earlier opinion limited the scope of remand other than the traditional language that the proceedings on remand had to be consistent with our opinion.

There is one final argument raised by defendant on this point that we should address, and which leads into the second issue on appeal: what is the proper calculation of plaintiff's federal taxable income on which the single business tax (SBT) could be levied. Defendant argues that the issue of the amount of plaintiff's federal taxable income was determined in the prior appeal because it was necessary to do so in order to reject plaintiff's argument in the prior appeal. As defendant correctly points out, this Court did state that whether S corporations have federal

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negligence penalty decision. *TMW*, 258 Mich App at 179. But, contrary to defendant's argument in its brief on appeal, we did not limit the scope of the remand solely to that issue.

taxable income is irrelevant because, regardless how that number is calculated, it is the basis for calculating the S corporation's business income, and the corporation is not entitled to the casual-transaction exclusion. *TMW*, 285 Mich App at 178. But defendant seems to overlook the Court's statement on the same page that "[i]t is true that S corporations have no federal taxable income at the federal level, as the parties concede." *Id*.[2] This statement does control the outcome, but not in defendant's favor.

The SBTA imposed a tax on a taxpayer's adjusted tax base. *TMW*, 285 Mich App at 173-174. "Tax base" was defined to mean "business income, before apportionment or allocation as provided in chapter 3, even if zero or negative, subject to the adjustments in this section." Former MCL 208.9(1). See also *TMW*, 285 Mich App at 174. And, for corporations, "business income" was defined as federal taxable income. Former MCL 208.3(3). See also *TMW*, 285 Mich App at 174. "Thus, if a person is a corporation, its business income is its federal taxable income, which in turn is also its tax base." *TMW*, 285 Mich App at 174.

The analysis thus becomes very simple. Plaintiff, as an S corporation, had no federal taxable income, except for its built-in gains and excess passive income. Therefore, only the amount of those built-in gains and excess passive income would constitute business income under the SBTA. And, thus, it only owed SBT on that amount, as the trial court concluded.

Finally, we briefly address defendant's argument that this Court previously found that plaintiff did, in fact, have business income subject to tax. We did not. Defen-

[2] There are two exceptions to this principle that affect plaintiff. When an S corporation was previously a C corporation, as was plaintiff, it can have taxable income based on built-in gains and excess passive income. See 26 USC 1374 and 1375.

dant's argument misrepresents the analysis of this Court in its prior opinion. Defendant quotes from our opinion, which noted that, in "the court's view, to read § 3(3) to mean that S corporations calculate their 'business income' on the basis of federal taxable income would result in S corporations avoiding all SBT liability." *Id*. at 171. Defendant then argues that by rejecting the trial court's conclusion that an S corporation is not a corporation for purposes of determining business income, this Court must have rejected the trial court's determination that S corporations have no tax liability. Defendant's argument is flawed because this Court never rejected the trial court's conclusion that S corporations have no tax liability because the trial court did not make such a determination in its original decision. Rather, the trial court's original opinion recognized that which defendant apparently did not: if S corporations are treated like any other corporation, rather than like a partnership, S corporations escape the SBT because they have no federal taxable income on which to calculate the SBT. For this reason, the trial court found it "nonsensical" to treat S corporations like other corporations and, therefore, concluded that they must be treated like partnerships so that, in general, they would be subject to the SBT (though plaintiff would potentially escape it in this case because it would then be allowed to claim the casual-transaction exclusion). What this Court rejected in our earlier opinion was the trial court's conclusion that S corporations must be treated like partnerships in order to prevent them from escaping the SBT. Rather, this Court concluded that S corporations are corporations and their SBT must be calculated as such, without regard to whether that results in no tax liability. *TMW*, 285 Mich App at 177-178.

Defendant would like to have it both ways. In the earlier appeal, defendant wanted plaintiff to be treated like any other corporation so that it could not claim the casual-transaction exclusion. In this appeal, defendant wants plaintiff to not be treated like any other corporation because that would result in it having virtually no taxable income on which to levy the SBT. But as this Court made clear in its earlier opinion, plaintiff must be treated like any other corporation. And that means that the trial court correctly concluded that the SBT could only be levied on its federal taxable income, which includes only a small amount of built-in gains and excess passive income.

Affirmed. Plaintiff may tax costs.

HOEKSTRA, P.J., and SAWYER and SAAD, JJ., concurred.

AFT MICHIGAN v STATE OF MICHIGAN

JOHNSON v PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM

McMILLAN v PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM

Docket Nos. 303702, 303704, and 303706. Submitted October 5, 2011, at Lansing. Decided August 16, 2012, at 9:00 a.m. Leave to appeal sought.

AFT Michigan, the Henry Ford Community College Adjunct Faculty Organization, and numerous other labor organizations that represent public school employees brought an action in the Court of Claims against the state of Michigan, seeking to enjoin further withholding by the employers, pursuant to MCL 38.1343e, of a percentage of the employees' wages and the remittance of that amount to the Michigan Public School Employees Retirement System (MPSERS) as "employer contributions" to the trust that funds retiree health-care benefits. Plaintiffs also sought a declaratory ruling that the statute is unconstitutional and to have the employees' withheld wages returned to them with interest. Timothy L. Johnson and three other public school employees also brought a similar action in the Court of Claims against the Public School Employees Retirement System and others, seeking similar relief. Deborah McMillan and four other public school employees likewise brought a similar action in the Court of Claims against the Public School Employees Retirement System and others, seeking similar relief. The Court of Claims, Clinton Canady, III, J., ordered in all three cases that the withheld wages be placed in an interest-bearing account, rather than the MPSERS trusts, and that they be maintained there until the legal challenge was resolved. The court then granted summary disposition in favor of the organizational plaintiffs in the first action and partial summary disposition in favor of plaintiffs and partial summary disposition in favor of defendants in both the second and third actions. The court also rejected defendants' motion to dismiss the labor organizations, holding that they had standing to challenge the statute, and rejected defendants' assertion that the claims were not ripe for review. The court held that the statute violated plaintiffs' rights under both the Taking Clauses and the Due Process Clauses of the United States and Michigan Constitutions but did not violate the constitutional provisions barring the

impairment of contracts by the state. The court also dismissed plaintiffs' common-law breach of contract claim. The state of Michigan appealed with regard to the first action (Docket No. 303702). The Public School Employees Retirement System and some of the other defendants in the other two actions appealed in the other actions, and the plaintiffs in those actions cross-appealed (Docket Nos. 303704 and 303706). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

MCL 38.1343e violates the federal and state constitutional protections against the impairment of contracts by the state and the taking of private property by the government without just compensation. The statute also violates the constitutional guarantee of substantive due process of law. The prohibition against governmental impairment of contracts was violated because the statute requires that school employees be paid less than the amount they and their employers had freely agreed on in contracts. The prohibition against the taking of private property without just compensation was violated because the statute directs that unique and definable monies in which plaintiff employees have a property interest be confiscated by their governmental employers and used to pay the statutorily mandated employers' contribution to a state fund and did not merely create a general obligation on the part of active employees to pay a certain sum. While the fund in question funds health-care benefits for present retirees, the active employees whose wages were taken have no vested right themselves to the receipt of health-care benefits upon their own retirement. The orders of the Court of Claims granting summary disposition or partial summary disposition in favor of plaintiffs in each case were affirmed, the stay ordered by the Court of Appeals on March 18, 2011, was terminated, and the cases were remanded to the Court of Claims for further proceedings.

1. Defendants failed to demonstrate that they were entitled to a judgment as a matter of law with regard to their claim that plaintiff labor organizations did not have standing to bring their action.

2. Plaintiffs' complaints that defendants' confiscation of a percentage of their compensation in order to pay for the health care of others violated constitutional protections and contract rights did not concern hypothetical events and were ripe for decision.

3. Requiring the present plaintiff employees to acquiesce to the wage confiscation as a condition of continued employment did not violate the prohibition against the impairment of accrued financial

benefits (plaintiff employees' pensions) contained in Const 1963, art 9, § 24. The prospective increases in their pensions that employees who refused to acquiesce in the confiscation and, therefore, lost their employment would have earned during their continued employment, are not already accrued financial benefits.

4. MCL 38.1343e operates as a substantial impairment of the employment contracts between plaintiffs and the employing educational entities. Because governmental entities were parties to the employment contracts and benefited from the impairment of the contracts, heightened scrutiny must be employed in reviewing the statute. Although courts have found statutes impairing contractual obligations to be reasonable and necessary when the impairment was the consequence of remedial legislation intended to correct systemic imbalances in the marketplace, the present case did not involve corrections to the marketplace to assure free competition. Although it has been held that a modest, temporary impairment of governmental contracts may be imposed as a matter of last resort to address a fiscal emergency, such circumstances must be extraordinary and the degree of the impairment with regard to its amount and its duration is central to the question whether the impairment passes constitutional muster. MCL 38.1343e works a severe, permanent, and immediate change in contractual relationships. The statute imposed a permanent impairment on the most fundamental aspect of employment contracts and did so not to deal with a short-term crisis, but as a long-term mechanism to restructure retirement benefit funding. The state failed to show that it first undertook to reduce retiree health-care benefits, or to require present retirees to contribute to their own health-care plans, or to restructure the benefits system in any way other than to legislate state-imposed modifications of freely negotiated contracts. The state failed to show that the particular impairment was necessary to the public good. MCL 38.1343e violates the prohibition against the impairment of contracts contained in US Const, art I, § 10 and Const 1963, art 1, § 10.

5. Plaintiff employees' wages are specific funds in which they unquestionably had a property interest. The government's taking of those wages was action that constituted a "taking" for purposes of the Taking Clauses of the United States and Michigan Constitutions. When the government did not merely impose an assessment or require payment of an amount of money without consideration, but instead asserted ownership of a specific and identifiable parcel of money, the Taking Clauses were implicated. Because MCL 38.1343e takes private property without providing

any form of compensation, the Court of Claims correctly ruled that the statute violated the Taking Clause of US Const, Am V and Const 1963, art 10, § 2.

6. The Court of Claims properly concluded that MCL 38.1343e is unconstitutional under the Due Process Clauses of US Const, Am XIV and Const 1963, art 1, § 17. The mandatory contributions imposed on current public school employees did not go to fund their own retirement benefits but, instead, to pay for retiree health care for already-retired public school employees. It does not comport with due process to require present school employees to transfer a percentage of their incomes in order to fund the retirement benefits of others. The statute did not provide that the monies obtained by the involuntary collection of a percentage of the workers' wages would be used to fund the retiree health-care benefits of those whose wages were being taken. MCL 38.1343e, which provides that the government confiscate the income of one discrete group in order to fund a specific governmental obligation to another discrete group, is unreasonable, arbitrary, and capricious and violates the Due Process Clauses.

Affirmed and remanded.

SAAD, J., concurring in part and dissenting in part, concurred with the conclusions of the majority that plaintiff labor organizations have standing to pursue this action and that plaintiffs' claims are ripe for judicial review. He also agreed that MCL 38.1343e does not impair or diminish accrued financial benefits of a pension plan in violation of Const 1963, art 9, § 24, because benefits earned after July 1, 2010, had not yet accrued when the statute was enacted. He disagreed with the holding that MCL 38.1343e violates the Contracts Clauses, US Const, art I, § 10 and Const 1963, art 1, § 10, the Taking Clauses of US Const, Am V and Const 1963, art 10, § 2, and the Due Process Clauses of US Const, Am XIV and Const 1963, art 1, § 17. The challenged public policy in these appeals did not even touch upon, much less impair, contracts and no property is taken by the state in the sense contemplated by US Const, Am V. Substantive due process is not a catch-all for failed constitutional claims. The Court of Appeals should have upheld MCL 38.1343e as constitutional. The Supreme Court has ruled that the Legislature created and may revoke retiree health-care benefits and that such benefits are neither a constitutionally protected contract right nor a vested right under the state Constitution. MCL 38.1343e has not operated as a substantial impairment of a contractual relationship because it does not affect, much less impair, any contract. To constitute an impairment of contract, there must first be a contract that is impaired. For plaintiffs to

state a claim, MCL 38.1343e must have altered either a contract between the state itself and the public school employees or the public school employees' contracts with some third party. MCL 38.1343e does neither. This claim must fail because no contract has been impaired. The public school employees had no contract with the state for retiree health-care benefits, nor did the public school employees have vested rights in retiree health-care benefits. The collective-bargaining agreements between the public school employees and various school districts were not even touched, much less impaired. The plaintiffs in Docket No. 303704 failed to allege that any collective-bargaining agreements existed or that such agreements formed the basis of the breach of contract count and they did not attach any contracts to their complaint. The state was not a party to the collective-bargaining agreements and could not be bound by them. In addition, the collective-bargaining agreements did not address the retiree health-care system because this is a benefit created by the state. The state's statutory mandate that public school employees contribute money to help defray the cost of retiree health-care benefits was between the state and each worker, and this had nothing to do with any contract. Regardless of the wage levels negotiated in collective-bargaining agreements, those levels were not affected. MCL 38.1343e sets forth a mechanism to ensure that each member of MPSERS make this contribution by requiring school districts to deduct the contribution from the member's pay and submit it to the retiree health-care system. That the state chose a paycheck deduction method simply did not convert a permissible legislatively mandated contribution into an unconstitutional impairment of contract. This case concerned the state's demands or financial assessment upon each public school employee and had nothing to do with any contract between each employee and the state or a third party. MCL 38.1343e does not effectuate a taking of private property for which the government must give just compensation. No caselaw holds that a "taking" occurs when the Legislature requires a public school employee to contribute money as a condition for receiving benefits in a state-created retirement health-care program, designed for the benefit of the employee. The declaratory ruling invalidating MCL 38.1343e was not an award of just compensation for a taking effectuated by an otherwise proper governmental action. The relief requested and granted in these cases was not that contemplated under the Taking Clauses, and the lower court's rulings should have been reversed. The majority's application of the Taking Clauses is legally unsupportable because requiring a monetary contribution to a retiree health-care plan did not trigger application of the clauses since no constitutionally

protected property interest was invaded. The percentage deductions from plaintiff employee's compensation were not physical appropriations of property. In limited situations, a specific fund of money may be considered property for Taking Clause purposes; however, no such fund exists here. Because the underlying allegations were that MCL 38.1343e operates to extract a percentage of plaintiff employees' compensation, the claims fell within the explicit sources of protection provided by the Taking or Contracts Clauses and resort to the generalized notion of substantive due process was thus improper. The trial court plainly erred by granting summary disposition to plaintiffs on the substantive due process claims.

1. CONSTITUTIONAL LAW — TAKING CLAUSE — CONTRACTS CLAUSE — DUE PROCESS — PUBLIC SCHOOL EMPLOYEES — RETIREE HEALTH-CARE BENEFITS.

MCL 38.1343e, which requires that public school districts and other reporting units withhold three percent of each employees' wages and remit the amount to the Michigan Public School Employees Retirement System as employer contributions to the trust that funds retiree health-care benefits, violates the constitutional protections against the impairment of contracts by the state, the taking of private property by the government without just compensation, and substantive due process (US Const, art I, § 10; US Const, Ams V and XIV; Const 1963, art 1, § 10; Const 1963, art 1, § 17; Const 1963, art 10, § 2).

2. CONSTITUTIONAL LAW — CONTRACTS CLAUSE — IMPAIRMENT OF CONTRACTS BY GOVERNMENT.

Courts determine whether a governmental impairment of a contract violates the Contract Clause by determining whether the government has shown that it did not consider impairing the contract on par with other policy alternatives, impose a drastic impairment when an evident and more moderate course would serve its purpose equally well, or act unreasonably in light of the surrounding circumstances; the courts generally are to determine whether the particular impairment is necessary to the public good (US Const, art I, § 10; Const 1963, art 1, § 10).

3. CONSTITUTIONAL LAW — CONTRACTS CLAUSE — IMPAIRMENT OF CONTRACTS BY GOVERNMENT.

Modest, temporary impairments of governmental contracts may be imposed as a matter of last resort to address a fiscal emergency; the circumstances must be extraordinary and the degree of the impairment with regard to its amount and its duration are central

questions to be answered in determining whether the impairment passes constitutional muster (US Const, art I, § 10; Const 1963, art 1, § 10).

4. CONSTITUTIONAL LAW — TAKING CLAUSE — MONEY.

A Fifth Amendment taking occurs, requiring the government to pay just compensation, when the government directly seizes property in which a person has a property interest; a violation per se of the Taking Clause occurs when the government does not merely impose an assessment or require payment of an amount of money without consideration but instead asserts ownership of a specific and identifiable parcel of money (US Const, Am V; Const 1963, art 10, § 2).

Mark H. Cousens for AFT Michigan and others.

Miller Cohen, P.L.C. (by *Bruce A. Miller* and *Keith D. Flynn*), for Timothy L. Johnson and others.

White, Schneider, Young & Chiodini, P.C. (by *James A. White*, *Kathleen Corkin Boyle*, and *Timothy J. Dlugos*), and *Arthur R. Przybylowicz*, for Deborah McMillan and others.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Frank J. Monticello* and *Larry F. Brya*, Assistant Attorneys General, for the state of Michigan, the Public School Employees Retirement System, the Public School Employees Retirement Board, the Department of Technology, Management, and Budget, and others.

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

SHAPIRO, P.J. In these three cases consolidated for appeal, plaintiff public school employees and their representative organizations raise various constitutional challenges to MCL 38.1343e. This provision was adopted in 2010 and amended article 3 of the Public

School Employees Retirement Act, MCL 38.1341 *et seq*., which governs the Michigan Public School Employees Retirement System (MPSERS), MCL 38.1321. MCL 38.1343e requires that public school districts and other reporting units[1] withhold three percent of each employee's wages and remit the amount to the MPSERS as "employer contributions" to the trust that funds retiree health care benefits.

We conclude that MCL 38.1343e violates multiple constitutional rights set forth in both the United States and Michigan Constitutions and is therefore invalid. Specifically, we conclude that the statute violates federal and state constitutional protections against the impairment of contracts by the state and the taking of private property by the government without compensation, as well as the constitutional guarantee of substantive due process. The prohibition against governmental impairment of contracts is violated because the statute requires that school employees be paid three percent[2] less than the amount they and their employers freely agreed on in contracts. The prohibition against the taking of private property is violated because MCL 38.1343e does not merely create a general obligation on the part of active employees to pay a certain sum, but instead directs that unique and definable monies in which plaintiff employees have a property interest be confiscated by their governmental employers. Moreover, the confiscated wages are then used to pay the

[1] These include intermediate school districts, public school academies, tax-supported community or junior colleges and universities and any agency having employees on its payroll who are members of the retirement system.

[2] The statute required any public school employee whose salary is less than $18,000 to contribute 1.5 percent for the fiscal year starting July 1, 2010. MCL 38.1343e. Beginning July 1, 2011, all employees were required to contribute the full three percent. *Id.*

statutorily mandated *employers'* contributions to a state fund. Finally, while the fund in question funds health care benefits for present retirees, the active employees whose wages are taken have no vested right themselves to the receipt of health care benefits upon their own retirement.

I. BACKGROUND

MCL 38.1343e became effective in 2010 and reads as follows:

> (1) Except as otherwise provided in this section, beginning July 1, 2010, each member shall contribute 3% of the member's compensation to the appropriate funding account established under the public employee retirement health care funding act [MCL 38.2731 *et seq.*]. For the school fiscal year that begins July 1, 2010, members who were employed by a reporting unit [i.e., school district] and were paid less than $18,000.00 in the prior school fiscal year and members who were hired on or after July 1, 2010 with a starting salary less than $18,000.00 shall contribute 1.5% of the member's compensation to the appropriate funding account established under the public employee retirement health care funding act. For each school fiscal year that begins on or after July 1, 2011, members whose yearly salary is less than $18,000.00 shall contribute 3% of the member's compensation to the appropriate funding account established under the public employee retirement health care funding act. The member contributions shall be deducted by the employer and remitted as employer contributions in a manner that the retirement system shall determine.
>
> (2) As used in this act, "funding account" means the appropriate irrevocable trust created in the public employee retirement health care funding act for the deposit of funds and the payment of retirement health care benefits.

A provision of 2010 PA 77, codified as MCL 38.2733(6), provides in pertinent part: "This act shall not be

construed to define or otherwise assure, deny, diminish, increase, or grant any right or privilege to health care benefits or other postemployment benefits to any person . . . ." Accordingly, MCL 38.1343e cannot be read to grant any "right or privilege" to retiree health care benefits beyond that already in place. And as determined by the Michigan Supreme Court in *Studier v Michigan Pub Sch Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005), school employee retiree health care benefits are not guaranteed by contract and do not constitute an accrued benefit protected from impairment or elimination by Const 1963, art 9, § 24.[3]

After the effective date of MCL 38.1343e, school districts began to withhold three percent of their employees' wages for remittance as employer contributions to the MPSERS. Plaintiffs brought suits in the Court of Claims to enjoin further withholding, to obtain a declaratory ruling that the statute was unconstitutional, and to have the withheld wages returned to them with statutory interest. The court ordered that the withheld wages be placed in an interest-bearing account, rather than the MPSERS trusts, and that they be maintained there until the legal challenge was resolved. The court later granted summary disposition or partial summary disposition in favor of plaintiffs in each of the three cases, two of which were brought by individual school employees and one by an array of labor organizations representing school employees.

The court rejected defendants' motion to dismiss the labor organizations as plaintiffs, holding that they had

[3] This provision of the Michigan Constitution provides, in part, that "accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby."

standing to challenge the statute. It also rejected defendants' assertion that the claims were not ripe for review.

With regard to the substance of the constitutional challenges, the court held that the statute violated plaintiffs' rights under both the Takings Clauses and the Due Process Clauses of the federal and state Constitutions. The trial court held that the statute did not violate the constitutional provisions barring the impairment of contracts by the state and also dismissed a common-law breach of contract claim.

II. STANDING

Defendants argue that the plaintiff labor organizations in Docket No. 303702 do not have standing to bring suit. Whether a party has standing is a question of law that this Court reviews de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 527; 695 NW2d 508 (2004). In reviewing a motion under MCR 2.116(C)(5), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties to determine whether the moving party was entitled to judgment as a matter of law. MCR 2.116(G)(5); *Kuhn v Secretary of State*, 228 Mich App 319, 332-333; 579 NW2d 101 (1998).

"It is not disputed that, under Michigan law, an organization has standing to advocate for the interests of its members if the members themselves have a sufficient interest." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 373 n 21; 792 NW2d 686 (2010). Defendants concede that if the organizational plaintiffs represent public school employees, then they have standing. The organizational plaintiffs assert that they represent public school employees. Defendants com-

plain that these plaintiffs have not produced evidence of their memberships. However, defendants do not provide any evidence to the contrary and it is plain that these plaintiffs represent public school employees. They have names such as "AFT Michigan" (American Federation of Teachers – Michigan) "Dearborn Federation of School Employees," and "Detroit Association of Educational Office Employees." Certainly defendants have not demonstrated that they are entitled to judgment on this point as a matter of law.

III. RIPENESS

Defendants also argue that the substantive issues in these cases are not ripe for decision. "A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Mich Chiropractic Council v Office of Fin & Ins Servs Comm'r*, 475 Mich 363, 371 n 14; 716 NW2d 561 (2006) (quotation marks and citations omitted), overruled on other grounds by *Lansing Sch*, 487 Mich at 371 n 18 (2010). Defendants argue that it is speculation to suggest that plaintiff employees will fail to receive health care benefits when they retire. However, plaintiff employees have not brought a claim to require the provision of health care benefits upon their retirement. Rather, plaintiff employees complain that *currently* three percent of their salaries are being withheld to pay for the health care of others, i.e. present school retirees. This Court addressed a similar situation in *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 7-8; 818 NW2d 337 (2011):

> Although defendants characterize plaintiffs' claims as seeking relief from a hypothetical event, plaintiffs allege a current confiscation of their compensation without adherence to the provisions of Const 1963, art 11, § 5 and in violation of

> their [collective-bargaining agreement] and contractual rights. Specifically, irrespective of the future availability of retiree health benefits to current employees, plaintiffs challenge the reduction in wages from November 1, 2010, through September 30, 2013. In light of the present reduction in compensation, defendants' jurisdictional challenge claiming that plaintiffs are raising a hypothetical scenario regarding events that may occur upon their retirement fails.

See, also, *Haring Charter Twp v City of Cadillac*, 490 Mich 987 (2012) (holding that the case was ripe for decision because the city had declared its intent not to renew the contracts at issue, despite the fact that future city councils might still decide to renew the contracts), aff'g *Haring Charter Twp v City of Cadillac*, 290 Mich App 728 (2010).

Because defendants are confiscating three percent of plaintiff employees' wages now, not at some hypothetical point in the future, this case is ripe for decision.

IV. IMPAIRMENT OF CONTRACT

The trial court concluded that MCL 38.1343e did not violate the Contract Clauses of the Michigan and United States Constitutions. US Const, art I, § 10 and Const 1963, art 1, § 10 both prohibit the enactment of a statute that impairs a contract and the two provisions are interpreted similarly. *In re Certified Question*, 447 Mich 765, 776-777; 527 NW2d 468 (1994). The first step is to determine " 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Id.* at 777, quoting *Allied Structural Steel Co v Spannaus*, 438 US 234, 244; 98 S Ct 2716; 57 L Ed 2d 727 (1978).

A. IMPAIRMENT OF PENSION BENEFITS

Plaintiff employees argue that requiring present employees to acquiesce in the confiscation of three percent

of their wages infringes on their right to receive their pensions. All parties agree that those pensions are accrued financial benefits under Const 1963, art 9, § 24 and, therefore, may not be impaired. Plaintiffs essentially argue that because acquiescence in the three percent wage confiscation is a condition of employment, any refusal to do so may result in loss of employment and thus a loss, i.e., impairment, of pension benefits that would have been earned during continued employment. We reject this argument because it amounts to a claim that every condition of employment is subject to constitutional challenge simply because sanctions for failure to comply with such conditions may result in discharge from employment and loss of potential pension benefits. Because prospective increases in pensions are not already accrued, this does not violate Const 1963, art 9, § 24.

B. IMPAIRMENT OF CONTRACTUALLY SET WAGES

We agree with plaintiffs that MCL 38.1343e operates as a substantial impairment of the employment contracts between plaintiffs and the employing educational entities. The contracts provide for a particular amount of wages and the statute requires that the employers not pay the contracted-for wages, but instead pay three percent less than the contracts provide.[4] We note that this is not a broad economic or social regulation that impinges on certain contractual obligations by happenstance or as a collateral matter. Rather, the statute directly and purposefully requires that certain employ-

[4] Defendants argue that plaintiffs failed to attach copies of their collective bargaining agreements to their pleadings. However, defendants do not dispute that plaintiffs *had* contracts that specified how much plaintiff employees were to be paid by their respective districts. Indeed, defendants could not plausibly deny it.

ers not pay contracted-for wages. Such an action is unquestionably an impairment of contract by the state. "In the employment context, there likely is no right both more central to the contract's inducement and on the existence of which the parties more especially rely, than the right to compensation at the contractually specified level." *Baltimore Teachers Union, American Federation of Teachers Local 340, AFL-CIO v Baltimore Mayor & City Council*, 6 F3d 1012, 1018 (CA 4, 1993). See, also, *Buffalo Teachers Federation v Tobe*, 464 F3d 362, 368 (CA 2, 2006) ("Contract provisions that set forth the levels at which union employees are to be compensated are the most important elements of a labor contract. The promise to pay a sum certain constitutes not only the primary inducement for employees to enter into a labor contract, but also the central provision upon which it can be said they reasonably rely.").

In *Baltimore Teachers*, the United States Court of Appeals for the Fourth Circuit held that a temporary furlough plan under which employees lost 0.95 percent of their annual salary for one year constituted a substantial impairment of contract.[5] The present case involves a reduction three times as great and in perpetuity, not merely for a single year. Plaintiff employees have agreed to provide their labor and expertise to the school districts for wages bargained for and set forth in contracts. For the state to mandate a three percent reduction in the contractually agreed-upon price of their labor is unquestionably an impairment of contract by the state.

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[5] In *Baltimore Teachers*, 6 F3d at 1018 n 8, the court noted that "because individuals plan their lives based upon their salaries, we would be reluctant to hold that any decrease in an annual salary beyond one that could fairly be termed *de minimis* could be considered insubstantial."

That does not, however, resolve the constitutional question. In order to determine whether that impairment violates the Contract Clause, we must determine whether the state has shown that it did not: "(1) 'consider impairing the . . . contracts on par with other policy alternatives' or (2) 'impose a drastic impairment when an evident and more moderate course would serve its purpose equally well,' nor (3) act unreasonably 'in light of the surrounding circumstances[.]' " *Buffalo Teachers*, 464 F3d at 371, quoting *United States Trust Co of New York v New Jersey*, 431 US 1, 30-31; 97 S Ct 1505; 52 L Ed 2d 92 (1977). Put more generally, we are to determine whether the particular impairment is "*necessary* to the public good . . . ." *In re Certified Question*, 447 Mich at 777 (emphasis added).

In addressing these issues, we must consider that the employers in question are themselves governmental entities and that these entities will benefit as a result of the challenged legislation, given that they are to use the monies from the wage reduction to pay "employer contributions" to the retiree health care benefits fund.[6] Because governmental entities are parties to the contracts and benefit from the impairment, we are to employ heightened scrutiny in our review of the statute. *Buffalo Teachers*, 464 F3d at 370-371.

As a general rule, courts have found statutes impairing contractual obligations to be reasonable and necessary when the impairment is the consequence of remedial legislation intended to correct systemic imbalances in the marketplace. Such legislation may have positive

[6] According to the record, the three percent wage reduction will cover nearly 40 percent of the overall employer contributions for retiree health care benefits. Affidavit of Phillip Stoddard, Director of the Office of Retirement Services of the Michigan Department of Technology, Management, and Budget, June 17, 2010.

or negative effects on particular economic actors and may in some cases result in the alteration of contractual obligations without offending the Contract Clause. For example, we rejected a Contract Clause challenge in *Health Care Ass'n Workers Compensation Fund v Bureau of Worker's Compensation Director*, 265 Mich App 236; 694 NW2d 761 (2005), which involved a statute designed to unclog the marketplace for workers' compensation insurance by eliminating unduly anticompetitive contractual provisions that punished employers for changing insurers *Id.* at 242. Similarly, the United States Supreme Court has held that correcting an imbalance between gas prices on the interstate and intrastate markets was a significant and legitimate state interest. *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400, 417; 103 S Ct 697; 74 L Ed 2d 569 (1983). The present case, however, does not involve corrections to the marketplace to assure free competition.

We recognize that there are cases holding that a modest, temporary impairment of governmental contracts may be imposed as a matter of last resort to address a fiscal emergency. However, as the cases relied on by defendants show, such circumstances must be extraordinary and the degree of the impairment with regard to its amount and its duration is central to the question whether the impairment passes constitutional muster. "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural*, 438 US at 245. As in *Allied Structural*, the statute at issue here works "a severe, permanent, and immediate change in [contractual] relationships . . . ." *Id.* at 250.

In *Baltimore Teachers*, 6 F3d at 1014, the city of Baltimore responded to sudden budget shortfalls

caused by reductions in state aid of over $37 million during the last three months of 1991 by imposing involuntary furloughs on city employees. These furloughs were not conceived of as a long-term funding mechanism, but instead as a temporary response to a fiscal emergency. *Id* at 1021. The furlough days resulted in Baltimore reducing annual salaries by less than one percent and only for a single year. Moreover, while the furloughs were involuntary, the employees' work hours were reduced to correspond with the reduction in their wages. The Fourth Circuit held that while the actions constituted an impairment of contract, they did not violate the Contract Clause because the wage reduction was temporary, the amount of the resulting reduction in wages was no greater than necessary to meet the immediate budgetary shortfall, and the city had first taken other actions including a significant cut in city services and laying off employees. *Id.* at 1020.

MCL 38.1343e reduces public school employees' wages by an amount more than three times that which concerned the court in *Baltimore Teachers* and with no time off in exchange. More important, MCL 38.1343e is not a temporary measure. It provides that the salaries of public school employees will be *permanently* reduced by three percent of whatever they and their employers agree to. The *Baltimore Teachers* court allowed a far more modest change and only on a temporary basis to address an immediate crisis. Here, the state imposed a permanent impairment on the most fundamental aspect of employment contracts and did so, not to deal with a short-term crisis, but as a long-term mechanism to restructure retirement benefit funding. Defendants presented no evidence in the trial court that other means of undertaking long-term restructuring of retiree health care benefit funding had been attempted or even reviewed. No proofs were offered regarding why

state interference with agreed-upon contracts was necessary in this situation, where the state unequivocally asserts (and plaintiffs concede) that the state has the authority to reduce retiree health care benefits at anytime and in any fashion because, under *Studier*, those benefits are not protected as "accrued financial benefits." The state has not shown that it first undertook to reduce retiree health care benefits, or to require present retirees to contribute to their own health care plans, or to restructure the benefits system in any way other than to legislate state-imposed modifications of freely negotiated contracts.

Defendants also rely on *Buffalo Teachers* where the state of New York imposed a temporary wage freeze preventing scheduled raises for employees of the city of Buffalo from going into effect, which the court held "substantially impairs the workers' contracts with the City." 464 F3d at 368. As in *Baltimore Teachers*, the factors that led the court to uphold the wage freeze were the temporary nature of the freeze, the fact that it did not reduce present wages, but only delayed increases, and the fact that the imposition of the temporary freeze came only after the city had raised taxes and laid off staff. *Id.* at 371-372. In this case, we are far removed from the facts that allowed the challenged governmental actions in *Baltimore Teachers* and *Buffalo Teachers* to survive the challenge.

Other courts have been unwilling to even go that far. In *Univ of Hawaii Prof Assembly v Cayetano*, 183 F3d 1096 (CA 9, 1999), the federal appeals court concluded that the state's action in delaying paydays by a few days, even without a reduction in the actual amount of pay, constituted a substantial impairment of contract because the timing of the regularly scheduled payment was part of the collective bargaining agreement. *Id.* at

1102-1104. As in *Baltimore Teachers* and *Buffalo Teachers*, the *Univ of Hawaii* court noted the higher level of scrutiny applicable to legislative interference with governmental, as opposed to private, contracts and struck down the payday delays, noting the district court's statement that " 'although perhaps politically more difficult, numerous other alternatives exist which would more effectively and equitably raise revenues' " such as additional budget restrictions, the repeal of tax credits, and the raising of taxes. *Id.* at 1107; see, also, *Donohue v Paterson*, 715 F Supp 2d 306 (ND NY, 2010).

Many courts have held that impairments of governmental employees' contracts by the state that have indefinite or permanent application clearly violate the Contract Clause. *Oregon State Police Officers' Ass'n v State*, 323 Or 356; 918 P2d 765 (1996) (striking down a state statute that required public employees to contribute six percent of their salaries to retiree benefits contrary to their contract); *Opinion of the Justices*, 364 Mass 847, 864; 303 NE2d 320 (1973) (striking down legislation increasing present employees' contributions to retiree benefits without an increase in the subject employees' own retirement benefits as "presumptively invalid" under the Contract Clause); *Singer v City of Topeka*, 227 Kan 356, 369; 607 P2d 467 (1980) (holding that a statute mandating an increase in public employees' contributions to their retirement plan without a commensurate increase in benefits "is an unconstitutional impairment of contract rights"); *Marvel v Dannemann*, 490 F Supp 170 (D Del, 1980); *Hickey v Pittsburgh Pension Bd*, 378 Pa 300; 106 A2d 233 (1954); *Allen v City of Long Beach*, 45 Cal 2d 128; 287 P2d 765 (1955).

For these reasons, we conclude that MCL 38.1343e violates US Const, art I, § 10 and Const 1963, art 1, § 10.

V. TAKINGS CLAUSE

Plaintiffs argue that MCL 38.1343e violates the Takings Clause of the Fifth Amendment of the United States Constitution and Const 1963, art 10, § 2, each of which prohibits the taking of private property for public use without just compensation.[7] Plaintiff employees'salaries are specific funds in which they unquestionably have a property interest. *Sims v United States*, 359 US 108, 110; 79 S Ct 641; 3 L Ed 2d 667 (1959) ("it is quite clear, generally, that accrued salaries are property").

Clearly, the government has "taken" three percent of plaintiff employees' wages in the dictionary-definition sense of the word. The state does not dispute that the school districts are taking possession of wages that, by contract, belong to plaintiff employees and are sending them to state-mandated funds as *employer* contributions. The question, however, is whether this action constitutes a "taking" as it has been defined for purposes of the Fifth Amendment and its Michigan constitutional counterpart. We conclude that it does.

It is well settled that when the government directly seizes property in which a person has a property interest, a Fifth Amendment taking occurs, requiring that the government pay compensation. However, taking cases involving a direct seizure of property typically involve real property and the exercise of eminent domain. Taking jurisprudence also commonly deals with claims that governmental regulatory actions impose such limits on the use of property that they amount to a taking.

Defendants argue that the confiscation or seizure of money, as opposed to physical property, cannot consti-

[7] Because the two clauses are coextensive, we will simply refer to "the Takings Clause" for simplicity.

tute a taking. Defendants point out that several courts have held that the general imposition of monetary assessments by the government does not raise Fifth Amendment concerns. See, e.g., *McCarthy v City of Cleveland*, 626 F3d 280 (CA 6, 2010). The law is, however, equally clear that where the government does not merely impose an assessment or require payment of an amount of money without consideration, but instead asserts ownership of a specific and identifiable "parcel" of money, it does implicate the Takings Clause. Indeed, the United States Supreme Court has termed such actions violations "per se" of the Takings Clause. *Brown v Legal Foundation of Washington*, 538 US 216, 235; 123 S Ct 1406; 155 L Ed 2d 376 (2003). In *Brown*, the Court held that where the government asserted a right to control the interest accrued on lawyer trust accounts (IOLTAs), even where such amounts were *de minimis*, it constituted an unconstitutional taking. *Id.* We applied this principle in *Butler v Michigan State Disbursement Unit*, 275 Mich App 309; 738 NW2d 269 (2007), where we found an unconstitutional taking of property when the state disbursement unit that collects and disburses child support payments deposited into the state treasury interest on the amounts awaiting disbursement. The amount in question with regard to the plaintiff, a recipient of child support payments, was merely 83 cents in 2005 and it could certainly be argued that the state could reasonably assess such a sum to pay for the collection service that benefited the children and custodial parent. However, because the money was part of a definable and distinct parcel of money in which the eventual recipient had a property interest, it could not be taken without payment of just compensation.[8]

[8] In *Brown*, the government was not required to pay compensation because the clients whose funds had been placed in an IOLTA account could

In *Webb's Fabulous Pharmacies, Inc v Beckwith*, 449 US 155; 101 S Ct 446; 66 L Ed 2d 358 (1980), a Florida county court retained the interest from a fund in its custody intended for the payment of Webb's creditors. *Id.* at 156-158. The Supreme Court held that the Florida statute authorizing the retention of the interest "has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held . . . ." *Id.* at 164. Further, the interest could not be treated as a fee for the use of the court because another statute specifically provided for a court fee based on the size of the fund deposited with the court. *Id.* "To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation . . . ." *Id.*[9]

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not have earned net income, i.e., interest in excess of administrative costs, had the funds been deposited in a non-IOLTA account. *Brown*, 538 US at 239-240. Similarly, in *Butler*, no compensation was ordered because the government's administrative costs were greater than the plaintiff's accrued interest, and the plaintiff's net loss was therefore zero. *Butler*, 275 Mich App at 313.

[9] In *Eastern Enterprises v Apfel*, 524 US 498, 503-504; 118 S Ct 2131; 141 L Ed 2d 451 (1998), the plaintiff alleged that the Coal Industry Retiree Health Benefit Act, 26 USC 9701 *et seq*., violated the Takings Clause because it required the plaintiff to pay premiums into a fund to cover benefits for retirees it had not employed. The Supreme Court found this to be unconstitutional. Four of the justices concluded that it violated the Takings Clause, while Justice Kennedy, in an opinion concurring in the judgment and dissenting in part, reached his conclusion under the Due Process Clause. However, the concerns raised by Justice Kennedy regarding the applicability of the Takings Clause do not arise in the instant case. In his opinion, Justice Kennedy stated:

> The Coal Act does not appropriate, transfer, or encumber an estate in land . . . a valuable interest in an intangible . . . *or even a bank account or accrued interest*. The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply *or the property it uses to do so*." *Eastern Enterprises*, 524 US at 540 (emphasis added).

That is by no means the case here. MCL 38.1343e confiscates a specific fund, i.e., plaintiff employees' paychecks, and removes three percent of the property before allowing them to take possession of their property.

Defendants rely on two cases from the Federal Circuit Court of Appeals as support for their position, but neither case provides such support. In *Adams v United States*, 391 F3d 1212 (CA Fed, 2004), the federal government had concluded that certain federal law enforcement personnel were administrative employees and, therefore, were not entitled to overtime pay at the rate specified in the Fair Labor Standards Act, 29 USC 201 *et seq*. The employees sued under the act and also asserted that the government's failure to pay overtime at the rate specified in the act constituted a taking. The *Adams* court held that an action to enforce payment of a statutory obligation for the payment, unlike a *contract* for a payment, did not concern a vested property right, without which a taking claim cannot arise. *Id.* at 1223. In *Adams*, the taking claim put the cart before the horse by arguing before any right to overtime pay at the rate specified in the act was determined to exist that the failure to pay overtime at that rate constituted a taking. *Id.* at 1221-1222. That is not the case here because it is undisputed that plaintiff employees have a contract-based property right in their own wages.

Kitt v United States, 277 F3d 1330, 1336-1337 (CA Fed, 2002), is similarly inapposite because it involved only a general obligation to pay money under a disputed provision of the tax code. The government did not assert ownership of any particular property and the court relied on that very point to reject the taking claim, noting that "[i]n some situations money itself may be the subject of a taking, for example, the government's seizure of currency or its levy upon a bank account. . . . In the present case, however, the government did not seize or take any property of the Kitts. All it did was to subject them to a particular tax to which they previously had not been subject. That government action did

not constitute a taking of the amount of the tax they had to pay." *Id.* at 1337.

Defendants lastly submit that the Takings Clause is not applicable because plaintiffs seek to invalidate MCL 38.1343e instead of seeking compensation for lost property. Defendants cite *Eastern Enterprises v Apfel*, 524 US 498; 118 S Ct 2131; 141 L Ed 2d 451 (1998), for this proposition, but only Justice Kennedy made such a statement in that case. *Id*. at 545 (Kennedy, J., concurring in the judgment and dissenting in part). Further, the Supreme Court in *Webb's* held a Florida statute unconstitutional under the Takings Clause. It appears that defendants here are arguing that rather than striking down the statute, we are limited to ordering that the confiscated wages be paid back in full as compensation. This unsupported view would require that we approve the continued taking of employees' wages by the government, but require the government to promptly return identical amounts (with interest) to those same employees. We decline to adopt this absurd and costly remedy.

Because MCL 38.1343e takes private property without providing any form of compensation, the trial court correctly ruled that the statute violates the Takings Clauses of the Fifth Amendment and Const 1963, art 10, § 2.

VI. SUBSTANTIVE DUE PROCESS

We also affirm the trial court's conclusion that MCL 38.1343e is unconstitutional under the Due Process Clauses of the Fourteenth Amendment and Const 1963, art 1, § 17.

> The Fourteenth Amendment to the United States Constitution and Const 1963, art 1, § 17 guarantee that no state shall deprive any person of "life, liberty or property,

> without due process of law." Textually, only procedural due process is guaranteed by the Fourteenth Amendment; however, under the aegis of substantive due process, individual liberty interests likewise have been protected against certain government actions regardless of the fairness of the procedures used to implement them. The underlying purpose of substantive due process is to secure the individual from the arbitrary exercise of governmental power. [*People v Sierb*, 456 Mich 519, 522-523; 581 NW2d 219 (1998) (some quotation marks omitted; citations omitted).]

"The essence of a claim of violation of substantive due process is that the government may not deprive a person of liberty or property by an *arbitrary* exercise of power." *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003).[10]

Defendants argue that the compelled contributions are not arbitrary because they are assessed against public school employees to support a fund that pays for retiree health care for public school employees. This, however, is an overly general characterization that gives the false impression that plaintiff employees are being required to contribute toward the funding of their own retirement benefits. The mandatory contributions imposed on current public school employees do not go to fund their own retirement benefits but, instead, to pay for retiree health care for already-retired public school employees.

While the present employees and the retired employees have in common their present or former employ-

[10] Defendants argue that plaintiffs must show governmental action that shocks the conscience, but that standard applies only to executive, not legislative, action. See *Sacramento Co v Lewis*, 523 US 833, 846; 118 S Ct 1708; 140 L Ed 2d 1043 (1998) ("[F]or half a century now we have spoken of the cognizable level of *executive* abuse of power as that which shocks the conscience.") (emphasis added).

ment by a public school employer, that does not mean that their interests as individuals (or even as groups of employees) are identical. Defendants have offered no legal basis for the conclusion that it comports with due process to require present school employees to transfer three percent of their incomes in order to fund the retirement benefits of others. Rather, it is a mandatory, direct transfer of funds from one discrete group, present school employees, for the benefit of another, retired school employees. The fact that these groups share employers does not render the scheme outside the constitutional protection of substantive due process.

Defendants seek to blur the issue by repeatedly arguing in their briefs that it is only fair for those who receive a health care benefit to help pay for it.[11] This

[11] See, e.g., defendants-appellants' brief ("[i]n exchange [for payment of three percent of their income], the Trust fund *will pay* for the cost of health care for . . . Plaintiffs-Appellees' when they retire") (emphasis added); ("[plaintiffs] are simply being required to pay for a *future benefit*") (emphasis added); ("Since Plaintiffs . . . *are the beneficiaries* of paid [retiree] health care, it is only fair that they help pay a portion of its costs.") (emphasis added); ("Once individual plaintiffs retire, they *will* receive the benefit of [their] contributions . . . .") (emphasis added); (MCL 38.1343e is a rational attempt to impose a portion of the cost of retiree health care on those persons who. . . *will receive* those very health care benefits when they retire.") (emphasis added); (it is proper to "[r]equir[e present employees] to contribute toward the cost of the health care that they *will receive* when they retire") (emphasis added); ("It is only fair that those who receive a health care benefit should have to help pay for it."); ("it is only fair and reasonable for those who *will benefit* from health care coverage to have to pay for a portion of its costs") (emphasis added). Defendant-cross-appellant's brief similarly states: ("Once Plaintiffs retire, their health care costs . . . will be paid from the assets in this fund."); ("Plaintiffs will receive health care when they retire in exchange for their contributions."); ("Plaintiffs will receive health care when they retire in exchange for their contributions."). At the same time, however, defendant-cross-appellee's brief repeatedly affirms the state's position that it has no obligation to pay health care benefits to the plaintiffs upon their retirement: ("no contract exists that requires the payment of retiree health care costs . . . . providing for health care

principle, however, is as irrelevant as it is self-evident. As noted, the statute does not provide that the monies obtained by the involuntary collection of three percent of the workers' wages will be used to fund the retiree health care benefits of those whose wages are being taken.

In *Studier*, 472 Mich 642, our Supreme Court made clear that public school retiree health care benefits do not constitute "accrued financial benefits" and so are not subject to Const 1963, art 9, § 24. The first clause of that provision provides that "[t]he accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." Because this clause does not apply to retiree health care benefits, the state has no contractual obligation to provide present state employees with such benefits and employees have no enforceable or vested right to receive such benefits. As a legal matter, an unenforceable promise is no promise at all.

Under *Studier*, the second clause of the provision, mandating that benefits be paid for in the year they are accrued,[12] is also not applicable to retiree health care benefits. Thus, the three percent of their wages being withheld does not go to prefund the present employees' own benefits. Moreover, these employees are not pos-

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benefits for public school retirees does not create a contractual right"); ("[Plaintiff] asserts that MCL 38.1343e impairs an 'accrued financial benefit' because they are required to pay 3% of their compensation. However, retiree health care is not an 'accrued financial benefit.' "); ("MCL 38.1391 did not create a contract which require[s] MPSERS to provide retiree health care"); ("Plaintiffs do not have a contract to receive health care when they retire.").

[12] "Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities." Const 1963, art 9, § 24.

sessed of any right to receive such benefits, however paid for, upon their own retirement.

We cannot envision a court approving as constitutional a statute that requires certain individuals to turn a portion of their wages over to the government in return for a "promise" that the government will return the monies, with interest, in 20 years when the government retains the unilateral right to "cancel" the "promise" at any time and does not even agree that, if they do so, the monies taken will be returned. School employees cannot constitutionally be required to "loan" money to their employer school districts,[13] with no enforceable right to receive anything in exchange and without even a binding guarantee that the "loan" will be repaid.

Defendants argue that the present case is analogous to *Mich Mfr Ass'n v Workers' Disability Compensation Bureau Director*, 134 Mich App 723; 352 NW2d 712 (1984), where this Court upheld a statute requiring all employers in the state to contribute to a fund to help defray the costs of workers' disability compensation for the logging industry. However, that case considered only whether the statute was enacted for a proper purpose and did not address whether it met the second prong of the constitutional test. *Id.* at 733-735. Moreover, the statute related to the broad policy objectives of the workers' compensation system that affect every worker and employer in the state. Workers' compensation legislation was adopted 100 years ago to create a system to share risks and to provide for the limited, but prompt, compensation of injured workers. In addition to obtaining general insurance or insuring themselves, all employers in the state may be required to contribute to specialized funds such as the Second Injury Fund, the

[13] We reiterate that the wages appropriated from employees are defined as "employer contributions" to the fund.

Silicosis, Dust Disease, and Logging Industry Compensation Fund, and the Self-Insurers' Security Fund. MCL 418.551. These assessments are part of a statewide economic regulatory system and contributions to the funding of that system are required of all employers in the state. The statute in *Mich Mfr* represented a small modification in an overall system of sharing risks intended to assure stability in the industrial marketplace.

The instant case is wholly different. Payment of health care benefits owed by the government to a particular set of its retired employees is not analogous to the maintenance of a statewide risk-sharing system to assure market and economic stability for the private sector. Rather, it is a question of the government's meeting a particular set of its own fiscal obligations. Here, the government seeks to do so by requiring a small subset of Michigan's population to surrender three percent of their wages, above and beyond that which they pay in taxes, with no guarantee of anything in return, to meet the government's obligation to other individuals. Defendants posit no evidence or even argument to suggest that the funding of these retirement benefits cannot be satisfied by measures that do not raise due process concerns.[14] We stress that the mechanism defined in MCL 38.1343e is *neither* one involving general taxation for a general fund with specific uses of the monies later determined by the Legislature *nor* one

[14] We offer no opinion regarding what funding choices would best fulfill the policies chosen by the Legislature, but note that the parties agree that such choices exist. The state always retains the authority to modify general taxes and it is not disputed that, under *Studier*, retiree health care benefits may be modified or reduced by statute. It would also seem that the constitutional defects in the three percent wage assessment could be addressed by adopting legislation categorizing retiree health care benefits as "accrued financial benefits."

imposing a fee for service to the payee. It is also not a mechanism that requires individuals to fund benefits that they themselves have a vested right to receive. The statute instead provides that the government confiscate the income of one discrete group in order to fund a specific governmental obligation to another discrete group. The fact that the members of one of these groups work for the same entities from which the members of the other group retired does not provide a rational basis to mandate what amounts to a direct transfer of income. MCL 38.1343e is thus unreasonable, arbitrary, and capricious and violates the Due Process Clause.

VII. CONCLUSION

We are not unmindful of the budgetary challenges facing local school districts and Michigan's institutions of higher education. Moreover, we recognize that the state Legislature is within its authority to adopt legislation to aid these entities as they seek to address those budgetary challenges. In exercising that authority, however, the Legislature remains constrained by the state and federal Constitutions and the rights they guarantee. MCL 38.1343e violates multiple provisions of these Constitutions. Accordingly, we affirm the trial court's orders granting summary disposition or partial summary disposition in favor of plaintiffs in each of the cases before us, terminate the stay ordered by this Court on March 18, 2011, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

BECKERING, J., concurred with SHAPIRO, P.J.

SAAD, J. (*concurring in part and dissenting in part*). I concur with the majority's conclusion that the plaintiff

labor organizations in Docket No. 303702 have standing to pursue this action on behalf of their members. I also concur with the majority's conclusion that plaintiffs' claims are ripe for judicial review. The majority also correctly concludes that MCL 38.1343e does not impair or diminish accrued financial benefits of a pension plan in violation of Const 1963, art 9, § 24 because benefits earned after July 1, 2010, had not yet accrued when the statute was enacted.

However, I respectfully disagree with the majority's key holdings that MCL 38.1343e violates the Contracts Clauses of the Michigan and United States Constitutions, US Const, art I, § 10 and Const 1963, art 1, § 10, the Takings Clauses of the Fifth Amendment and Const 1963, art 10, § 2, and the Due Process Clauses of the Fourteenth Amendment and Const 1963, art 1, § 17. Accordingly, I dissent from the majority's decision to affirm the orders of the Court of Claims granting summary disposition in favor of plaintiffs in each of the cases before us.

I. NATURE OF THE CASE

In 1974 PA 244, the Michigan Legislature amended the Public School Employees Retirement Act, 1945 PA 136, to provide, on or after January 1, 1975, health care benefits for retired employees of the Michigan public schools. The act provided that the Michigan Public School Employees Retirement System (MPSERS) would pay health care premiums for retired employees and their dependents under any group health plan authorized by the retirement commission. MCL 38.325b(1). In 1980, the Legislature enacted the Public School Employees Retirement Act of 1979, 1980 PA 300, MCL 38.1301 *et seq.*, setting forth the health care coverage provision in MCL 38.1391(1). Pursuant to

MCL 38.1341, public schools must contribute to the MPSERS a percentage of the total amount of their payroll to pay the cost of health care premiums for retirants and their dependents. In other words, Michigan taxpayers have, for years, paid for public school employees' retiree health care benefits.

Over the years, the number of retiree participants in the MPSERS program has grown significantly and, therefore, so has the expense to the taxpaying public, which knows little about this unseen, but enormous, cost to the public education system. Indeed, Phillip Stoddard, Director of the Office of Retirement Services of the Michigan Department of Technology, Management, and Budget, estimated that, for the year beginning October 1, 2010, the cost of health care for retirees and their dependents would exceed $920,000,000. Thus, it now costs school districts (meaning taxpayers) almost a billion dollars a year for retiree health care alone. Faced with these unsustainable, increasing costs, the Legislature has passed various amendments to increase the copays and deductibles that retirees pay for their health care. These modifications that require retired public school employees to contribute to their health care costs have survived constitutional challenge from education workers. Indeed, our Supreme Court has ruled that the Legislature created and may revoke this taxpayer-funded benefit and that retiree health care benefits are not a constitutionally protected contract right, nor a vested right under the Michigan Constitution.

With the enactment of MCL 38.1343e, the Legislature now requires current public school employees to not only pay copays and deductibles upon retirement, but also to pay dollars directly into the program from which they will reap generous retiree health care ben-

efits. Again, the public school employees object by claiming constitutional infirmities that, in truth, do not exist. I respectfully disagree with the majority's ruling because the challenged legislation is constitutional.

II. IMPAIRMENT OF CONTRACT

The majority's holding that MCL 38.1343e violates the Contracts Clauses is incorrect because, as a matter of law, MCL 38.1343e has not "operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co v Spannaus*, 438 US 234, 244; 98 S Ct 2716; 57 L Ed 2d 727 (1978). Indeed, MCL 38.1343e cannot possibly implicate these constitutional provisions because it does not affect, much less impair, any contract. Simply put, to constitute an impairment of contract, there must first be a contract that is impaired. Thus, for plaintiffs to state a claim, MCL 38.1343e must have altered either a contract between the state itself and the public school employees or the public school employees' contracts with some third party. MCL 38.1343e does neither. And, because no contract has been impaired, this claim must fail.

I begin with the established principle that legislative enactments are presumed to be constitutional absent a clear showing to the contrary. *Mich Soft Drink Ass'n v Dep't of Treasury*, 206 Mich App 392, 401; 522 NW2d 643 (1994). "The party challenging the constitutionality of legislation bears the burden of proof." *Id*. The majority holds that MCL 38.1343e violates the Contracts Clauses of the United States and Michigan Constitutions. US Const, art I, § 10 and Const 1963, art 1, § 10. US Const, art I, § 10, cl 1, provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." Similarly, Const 1963, art 1, § 10

states: "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." "Our state constitutional provision is not interpreted more expansively than its federal counterpart." *Attorney General v Michigan Pub Serv Comm*, 249 Mich App 424, 434; 642 NW2d 691 (2002). The constitutional prohibition on impairment of contracts is not absolute and must be accommodated to the state's inherent police power to safeguard the vital interests of the people. *Health Care Ass'n Workers Compensation Fund v Bureau of Worker's Compensation Director*, 265 Mich App 236, 240-241; 694 NW2d 761 (2005).

First, under the Michigan Supreme Court's ruling in *Studier v Michigan Pub Sch Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005), the public school employees have no contract with the state for retiree health care benefits, nor do the public school employees have vested rights in retiree health care benefits.[1]

[1] In *Studier*, the Michigan Supreme Court held that MCL 38.1391(1) does not create a contract with public school retirees for retiree health care benefits. The plaintiffs, six public school retirees, argued that increases in their prescription drug copayments and deductibles violated US Const, art I, § 10, and Const 1963, art 1, § 10, both of which prohibit a law that impairs an existing contractual obligation. *Studier*, 472 Mich at 647-648. The Supreme Court noted that, in general, "one legislature cannot bind the power of a successive legislature." *Id*. at 660. This principle can be limited where it is in tension with the constitutional prohibitions against the impairment of contracts. *Id*. at 660-661. However, "such surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments." *Id*. at 661 (citation omitted). Thus, a strong presumption exists that statutes do not create contractual rights. *Id*. Absent a clear indication that the Legislature intended to bind itself contractually, a law is presumed not to create contractual or vested rights. *Id*. To form a contract, the language of a statute must be plain and susceptible of no other reasonable construction than that the Legislature intended to bind itself. *Id*. at 662. Absent an expression of such an intent, "courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party." *Id*.

Second, the collective bargaining agreements (CBAs) between the public school employees and various school districts are not even touched, much less impaired. Though the plaintiffs in Docket No. 303704 argue that their breach of contract count is based on CBAs with their local school districts entitling them to compensation at rates established in the agreements, in their complaint, they did not allege that any CBAs existed or that such agreements formed the basis of the breach of contract count and they did not attach any contracts to their complaint.[2] Further, the state is not a party to the

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Applying these principles, the *Studier* Court concluded that the plaintiffs had failed to overcome the strong presumption that the Legislature did not intend to surrender its legislative powers by entering a contractual agreement to provide retiree health care benefits to public school employees. *Id.* at 663. "Nowhere in MCL 38.1391(1), or in the rest of the statute, did the Legislature provide for a written contract on behalf of the state of Michigan or even use terms typically associated with contractual relationships, such as 'contract,' 'covenant,' or 'vested rights.' " *Id*. at 663-664. Had the Legislature intended to surrender its power to amend the statute to remove or diminish the benefits provided, it would have done so explicitly. *Id*. at 665.

Studier is directly controlling here. Further, though the *Studier* Court did not specifically address MCL 38.1391(4), the Court referred generally to "the rest of the statute" in stating that no written contract on behalf of the state was created. In any event, MCL 38.1391(4), like MCL 38.1391(1), contains no language expressing any intent by the Legislature to surrender its powers, nor does it contain any terms typically associated with contractual relationships. Therefore, no contracts entitling plaintiff employees to receive retiree health care benefits exist.

[2] Plaintiffs in Docket No. 303704 note that an employment contract necessarily exists for every employee who performs services in exchange for compensation regardless of whether there was a CBA and, thus, that the failure to plead the existence of CBAs was not fatal to plaintiffs' claims. The majority echoes this notion, asserting that defendants cannot "plausibly deny" that plaintiffs worked under CBAs. Again, however, plaintiffs did not merely fail to allege that any CBAs existed, they failed to allege that *any* employment contract for wages was impaired by the operation of MCL 38.1343e.

CBAs and cannot be bound by them. *Equal Employment Opportunity Comm v Waffle House, Inc*, 534 US 279, 294; 122 S Ct 754; 151 L Ed 2d 755 (2002); *Baraga Co v State Tax Comm*, 466 Mich 264, 266; 645 NW2d 13 (2002).

In any case, obviously, the CBAs do not address the retiree health care system because this is a benefit created by the state. By virtue of MCL 38.1343e, the state now requires public school employees to contribute money to help defray the cost of retiree health care benefits. This statutory mandate is between the state and each worker, and this has nothing to do with any contract. Regardless of the wage levels negotiated in CBAs for principals, teachers, or noninstructional workers, those levels are not affected. If, for example, a school district has contracted with a teacher to pay him or her $80,000 a year, the state's mandate that the employee pay three percent under MCL 38.1343e does not alter the school district's contractual obligation. Indeed, the state Legislature could change the mandate to four percent or one percent and the school district would nevertheless be required by contract (CBA) to pay the teacher $80,000 a year. MCL 38.1343e simply sets forth a mechanism to ensure that each member of MPSERS makes this contribution by requiring school districts to deduct the contribution from the member's pay and submit it to the retiree health care system. But the particular method is quite apart from the terms of any labor agreement and, indeed, the state could have enforced this mandate by a lump sum or periodic payments made directly by each member. That the state chose a paycheck deduction method simply does not convert a permissible legislatively mandated contribution into an unconstitutional impairment of contract. Clearly, this case concerns the state's demands or financial assessment upon each public school employee,

and has nothing to do with any contract between each employee and the state, or a third party. Accordingly, this constitutional theory to challenge this legislation should be rejected.

III. TAKINGS CLAUSES

I also dissent from the majority's holding that the plaintiffs in Docket Nos. 303704 and 303706 established that MCL 38.1343e effectuates a taking under the United States and Michigan Constitutions. Quite simply, MCL 38.1343e does not effectuate a taking of private property for which the government must give just compensation. Further, no caselaw holds that a "taking" occurs when the Legislature requires a public school employee to contribute money as a condition for receiving benefits in a state-created retirement health care program, designed for the benefit of the employee.

US Const, Am V provides that private property shall not "be taken for public use, without just compensation." This prohibition applies against the states through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc v Beckwith*, 449 US 155, 160; 101 S Ct 446; 66 L Ed 2d 358 (1980); *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576 n 3; 575 NW2d 531 (1998). Also, Const 1963, art 10, § 2 states: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." The Takings Clauses do not prohibit the taking of private property; rather, they place a condition on the exercise of that power. *First English Evangelical Lutheran Church of Glendale v Los Angeles Co*, 482 US 304, 314; 107 S Ct 2378; 96 L Ed 2d 250 (1987); *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 261; 792 NW2d 781 (2010). "This basic understanding of the [Fifth] Amendment

makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 US at 315.

Here, plaintiffs do not seek "just compensation" for the "taking of property" arising from an otherwise proper governmental interference. *Id*. Rather, they alleged that MCL 38.1343e is unconstitutional as applied to them and sought a declaratory ruling to that effect. The trial court granted the requested relief, ordering defendants to "cease and desist from enforcing or implementing MCL 38.1343e and from deducting 3% of members' compensation," in addition to requiring defendants to return, with interest, the contributions already deducted. This declaratory ruling invalidating the statute was not an award of just compensation for a taking effectuated by an otherwise proper governmental action. Thus, the relief requested and granted in these cases is not that contemplated under the Takings Clauses, and the rulings should be reversed.

The majority's application of the Takings Clauses to plaintiffs' claims is legally unsupportable. Again, requiring a monetary contribution to a retiree health care plan does not trigger the clauses because no constitutionally protected property interest is invaded. The percentage deductions from plaintiff employees' compensation are not physical appropriations of property. Money is fungible and, quite simply, it is artificial to view the deductions as a taking of property requiring just compensation. *United States v Sperry Corp*, 493 US 52, 57-58, 62 n 9; 110 S Ct 387; 107 L Ed 2d 290 (1989). The deductions are merely the Legislature's chosen means to effectuate the employees' obligation under MCL 38.1343e to contribute to their own retirement

system in which, under existing law, MCL 38.1391, they will participate upon retirement.

I recognize that, in limited situations, a specific fund of money may be considered property for Takings Clause purposes, *Webb's Fabulous Pharmacies*, 449 US at 156, but no such fund exists here. Further, it is well established that a specific property right or interest must be at stake in order to find a regulatory taking. See *Eastern Enterprises v Apfel*, 524 US 498, 541-542, 544-546; 118 S Ct 2131; 141 L Ed 2d 451 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy noted that although the statute at issue in that case imposed a financial burden, it did so without operating on or altering an identified property interest. *Id*. at 540.

> The [statute] does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so. [*Id*.]

In *Eastern Enterprises*, Justice Kennedy would have held that the Takings Clause did not apply. *Id*. at 547-550. Contrary to the majority's assertion that "only Justice Kennedy made such a statement," Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, agreed with Justice Kennedy that the Takings Clause did not apply because the case involved "not an interest in physical or intellectual property, but an ordinary liability to pay money, and not to the Government, but to third parties." *Id*. at 554 (Breyer, J., dissenting). Justice Breyer noted that in *Webb's Fabulous Pharmacies*, the monetary interest at issue "arose

out of the operation of a specific, separately identifiable fund of money. And the government took that interest for itself." *Id*. at 555.[3]

The majority labors to find a taking by denominating money as property, despite contrary law and despite our Supreme Court's holding constitutional prior modifications of the MPSERS with regard to copays and deductibles—also money. The majority reasons that increasing the dollars a retiree must pay is different from requiring current public school workers to contribute money to pay for current retirees who, incidentally, may have been coworkers yesterday and whom current workers may join tomorrow. Regardless, of course, this distinction has no relevance because it is a retiree health care system in which all may share and to which the Legislature has said all must contribute.

Again, MCL 38.1343e states a condition that, after the effective dates of the statute, public school employees

[3] And, a point the majority avoids is that, on the basis of the analysis expressed by the five justices in *Eastern Enterprises*, lower federal courts have repeatedly held that the imposition of an obligation to pay money does not constitute a taking of private property. See *Parella v Retirement Bd of the Rhode Island Employees' Retirement Sys*, 173 F3d 46, 50 (CA 1, 1999); *Commonwealth Edison Co v United States*, 271 F3d 1327, 1329, 1340 (CA Fed, 2001) ("while a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment"); *Adams v United States*, 391 F3d 1212, 1225 (CA Fed, 2004) ("We decline to treat a statutory right to be paid money as a legally-recognized property interest, as we would real property, physical property, or intellectual property."). In *McCarthy v City of Cleveland*, 626 F3d 280, 286 (CA 6, 2010), the court held "that the Takings Clause 'is not an appropriate vehicle to challenge the power of [a legislature] to impose a mere monetary obligation without regard to an identifiable property interest,' " quoting *Swisher Int'l, Inc v Schafer*, 550 F3d 1046, 1057 (CA 11, 2008). The *McCarthy* court noted that although some lower federal courts have followed the *Eastern Enterprises* plurality's taking analysis, those courts "have done so only where a specific private property interest is *retroactively* affected." *McCarthy*, 626 F3d at 286.

must contribute money to a program the Legislature created for those employees upon retirement. Thus, any property interests in the wage levels contained in plaintiffs' respective CBAs were not *retroactively* affected. See *McCarthy*, 626 F3d at 286, and cases cited therein. Further, unlike in *Webb's Fabulous Pharmacies* and *Phillips v Washington Legal Foundation*, 524 US 156; 118 S Ct 1925; 141 L Ed 2d 174 (1998), no extraction of interest generated in a specific fund of money has occurred. The essence of plaintiffs' claim is that the state may not take future wages established by their CBAs. Though this is a fallacy because the state demands payment from each worker irrespective of any negotiated wage levels, if there is a remedy, the proper remedy lies in contract, not taking, and a valid taking claim will lie only when the property rights exist independently of the claimants' so-called contracts with the government. *Niagara Mohawk Power Corp v United States*, 98 Fed Cl 313, 315 (2011). See also *Peick v Pension Benefit Guaranty Corp*, 724 F2d 1247, 1276 (CA 7, 1983); *Klamath Irrigation Dist v United States*, 67 Fed Cl 504, 534 (2005), mod on other grounds 68 Fed Cl 119 (2005). Importantly, however, the fact that a contract theory may not yield a recovery or provide a full remedy in a given case " 'does not give life to a takings theory.' " *Niagara Mohawk*, 98 Fed Cl at 316, quoting *Home Savings of America, FSB v United States*, 51 Fed Cl 487, 495-496 (2002). In other words, that a Contracts Clause claim provides no relief does not resurrect an equally spurious taking claim. Which brings us to plaintiffs' substantive due process claim, which well-established law says cannot be maintained simply because the "taking" and "impairment" claims provide no remedy.

IV. SUBSTANTIVE DUE PROCESS

I also dissent from the majority's holding that the plaintiffs in Docket No. 303702 established that MCL

38.1343e is unconstitutional under the Due Process Clauses of the Fourteenth Amendment and Const 1963, art 1, § 17. Because the Takings and Contracts Clauses provide explicit textual sources of constitutional protection regarding the type of governmental conduct at issue (but provide no relief for the reasons already stated), plaintiffs are precluded from asserting generalized substantive due process claims. That the majority holds otherwise is clearly contrary to our constitutional jurisprudence. *Sacramento Co v Lewis*, 523 US 833, 842; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). The clause should not be invoked to "do the work" of other constitutional provisions, even when they offer a plaintiff no relief. *Stop the Beach Renourishment, Inc v Florida Dep't of Environmental Protection*, 560 US ___, ___; 130 S Ct 2592, 2605-2606; 177 L Ed 2d 184, 200 (2010) (plurality opinion by Scalia, J.). The plaintiffs in Docket Nos. 303704 and 303706 expressly alleged contract and taking claims. The complaint in Docket No. 303702 alleges only a substantive due process claim, but the label placed on a claim is not dispositive. *Flying J Inc v City of New Haven*, 549 F3d 538, 543 (CA 7, 2008); *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). The gravamen of an action is determined by considering the entire claim. *Maiden v Rozwood*, 461 Mich 109, 135; 597 NW2d 817 (1999). Because the underlying allegations are that MCL 38.1343e operates to extract a percentage of plaintiff employees' compensation, the claims fall within the explicit sources of protection provided by the Takings or Contracts Clauses. Resort to the generalized notion of substantive due process is thus improper. *Cummins v Robinson Twp*, 283 Mich App 677, 704; 770 NW2d 421 (2009). Accordingly, I would hold that the trial court plainly erred by granting summary disposition to plaintiffs on the substantive due process claims.

V. CONCLUSION

To discharge their solemn duty under the Constitution, courts must invalidate clearly unconstitutional legislation, but must also defer to the Legislature when the public policy is one that may offend the litigants, but not the Constitution.

Here, because the challenged public policy does not even touch upon, much less impair, contracts and no property is taken by the state in the sense contemplated by the Fifth Amendment, and because substantive due process is not a catchall for failed constitutional claims, it would have been prudent and in keeping with our Court's limited charge under the Constitution to uphold this legislation as constitutional, because it is.

HAMMEL v SPEAKER OF THE HOUSE OF REPRESENTATIVES

Docket No. 309484. Submitted August 8, 2012, at Lansing. Decided August 16, 2012, at 9:05 a.m. Leave to appeal denied, 493 Mich 973.

State Representatives Richard Hammel, Kate Segal, Mark Meadows, Woodrow Stanley, Steven Lindberg, and Jeff Irwin filed an action against the Speaker of the House of Representatives, Speaker of the House Pro Tem, the House Majority Floor Leader and the House of Representatives in the Ingham Circuit Court, seeking a preliminary injunction and a writ of mandamus to enjoin the immediate effect of House Bill 4246 (HB 4246) and House Bill 4929 (HB 4929). Both house bills addressed legislation that would affect the collective bargaining rights of public employees. HB 4246 was passed by the House on February 23, 2011. A motion for immediate effect prevailed on a voice vote with two-thirds of the House members voting in support. After being modified and approved by the Senate, the House passed the amended version of HB 4246, which was given immediate effect, signed by the Governor, and filed with the Secretary of State on March 13, 2012. HB 4929 was passed by the House on September 15, 2011. A motion for immediate effect prevailed on a voice vote by House members. The House passed the Senate-approved-and-modified version of HB 4929 and it was given immediate effect, signed by the Governor, and filed with the Secretary of State on March 16, 2012. Plaintiffs argued that defendants had violated the Constitution by giving immediate effect to both house bills without first performing a roll call vote. The court, Clinton Canady, III, J., granted plaintiffs' preliminary injunction motion and enjoined the immediate effect of the bills, finding that the lack of a roll call vote violated Const 1963, art 4, §§ 18 and 27. Defendants appealed by leave granted.

The Court of Appeals *held*:

1. The purpose of a preliminary injunction is to preserve the status quo pending a final hearing regarding the parties' rights. To obtain a preliminary injunction the moving party must prove (1) the likelihood that the party will prevail on the merits, (2) the danger that the moving party will suffer an irreparable harm if the injunction is not issued, (3) the risk that the moving party would

be harmed more by the absence of an injunction than the opposing party would be by granting the relief, and (4) the harm to the public interest if the injunction is issued. The court erred by granting plaintiffs' motion for a preliminary injunction because plaintiffs failed to demonstrate that they were likely to prevail on the merits of the claim and failed to establish that an irreparable harm would occur if injunctive relief was not granted.

2. Article 4, § 27 of the Michigan Constitution states that no act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the Legislature may give immediate effect to acts by a 2/3 vote of the members elected to and serving in each house. Under Const 1963, art 4, § 18 each house of the Legislature is required to keep a journal of its proceedings, including the record of the vote and the name of the members of either house voting on any question shall be entered in the journal at the request of 1/5 of the members present. It is within the House's discretion to formulate its own rules regarding the method for obtaining a 1/5 vote for a roll call vote. The official House and Senate Journals are conclusive evidence of those bodies' proceedings and when no evidence to the contrary appears in the journal the propriety of the proceedings is presumed. Parol evidence may not be used to contradict the journals and to show that the Legislature violated the Constitution when enacting a statute. The trial court erred by concluding that the Constitution requires that the Legislature conduct a roll call vote to give immediate effect to an act. The plain language of Const 1963, art 4, § 27 does not specify that a roll call vote is required before giving an act immediate effect. In addition, because other sections of the Constitution do require a roll call vote, the absence of such language in article 4, § 27 indicates that the omission was intentional. Moreover, the House Journal contains no evidence that a 1/5 vote requesting a roll call vote was obtained for either house bill and plaintiffs' affidavits contradicting the journal were inadmissible parol evidence. Accordingly, when reviewing the motion for preliminary injunction, the trial court erred by concluding that plaintiffs would succeed on the merits of their claim.

3. To meet the burden of establishing the existence of an irreparable harm when seeking a preliminary injunction, the moving party must demonstrate a particularized showing of irreparable harm with the injury being evaluated in light of the totality of the circumstances affecting, and the alternatives available to, the moving party. Plaintiffs failed to demonstrate that the failure to take a roll call vote on the decision to give immediate effect to the house bills resulted in irreparable harm to their constituents. The lack of a roll call vote did not affect the peoples'

right to referendum under Const 1963, art 2, § 9 or art 4, § 27, because the power of referendum may be invoked within 90 days of the final adjournment of the legislative session and nothing implies that the immediate effect of the law infringes upon the right to the referendum.

Trial court order reversed, preliminary injunction vacated, and case remanded for an order of dismissal.

1. INJUNCTIONS — PRELIMINARY INJUNCTIONS — STANDARDS OF REVIEW — IRREPARABLE HARM.

The purpose of a preliminary injunction is to preserve the status quo pending a final hearing regarding the parties' rights and the moving party must prove (1) the likelihood that the party will prevail on the merits, (2) the danger that the moving party will suffer an irreparable harm if the injunction is not issued, (3) the risk that the moving party would be harmed more by the absence of an injunction than the opposing party would be by granting the relief, and (4) the harm to the public interest if the injunction is issued; to meet the burden of establishing the existence of an irreparable harm when seeking a preliminary injunction, the moving party must demonstrate a particularized showing of irreparable harm with the injury being evaluated in light of the totality of the circumstances affecting, and the alternatives available to, the moving party.

2. STATUTES — IMMEDIATE EFFECT — LEGISLATIVE JOURNALS — ROLL CALL VOTES.

Article 4, § 27 of the Michigan Constitution provides that the Legislature may give immediate effect to acts by a 2/3 vote of the members elected to and serving in each house but the Constitution does not require a roll call vote before giving an act immediate effect; under Const 1963, art 4, § 18 each house of the Legislature is required to keep a journal of its proceedings, including the record of the vote and the name of the members of either house voting on any question shall be entered in the journal at the request of 1/5 of the members present; the House has discretion to formulate its own rules regarding the method for obtaining a 1/5 vote for a roll call vote; the official House and Senate Journals are conclusive evidence of those bodies' proceedings and when no evidence to the contrary appears in the journal the propriety of the proceedings is presumed; parol evidence may not be used to contradict the journals and to show that the Legislature violated the Constitution when enacting a statute; the plain language of Const 1963, art 4, § 27 does not specify that a roll call vote is required before giving an act immediate effect.

Miller, Canfield, Paddock and Stone, PLC (by *Michael J. Hodge* and *Scott R. Eldridge*), for Richard Hammel, Kate Segal, Mark Meadows, Woodrow Stanley, Steven Lindberg, and Jeff Irwin.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Heather S. Meingast* and *Daniel E. Sonneveldt*, Assistant Attorneys General, for the Speaker of the House of Representatives, the Speaker Pro Tem of the House of Representatives, the House of Representatives Majority Floor Leader, and the House of Representatives.

Amicus Curiae:

Fink + Associates Law (by *David H. Fink* and *David Bressack*), for the University of Michigan.

Before: TALBOT, P.J., and WILDER and RIORDAN, JJ.

RIORDAN, J. Defendants appeal by leave granted a preliminary injunction enjoining the immediate effect of House Bill 4246 (HB 4246) and House Bill 4929 (HB 4929). We granted appellants' application for leave to appeal and motion for immediate consideration. We stayed the trial court's order and further proceedings pending the resolution of this appeal. Because plaintiffs fail to demonstrate a likelihood of success on the merits or an irreparable harm, we reverse the trial court's order, vacate the preliminary injunction, and remand for an order of dismissal.

I. FACTUAL BACKGROUND

HB 4246 was introduced in the House of Representatives to amend the public employment relations act

(PERA), MCL 423.201 *et seq.*, and addressed legislation relating to the rights of public employees in collective-bargaining situations. The House passed HB 4246 on February 23, 2011, with a 62 to 47 vote. A motion for immediate effect prevailed on a voice vote with two-thirds of the House members voting in support. After being modified and approved by the Senate, the House passed the amended version of HB 4246 with a 63 to 47 vote. HB 4246 was given immediate effect, signed by the Governor, and filed with the Secretary of State on March 13, 2012.

HB 4929 also involved a proposed amendment to the PERA that affected the collective bargaining rights of public employees. The House passed HB 4929 on September 15, 2011, with a narrower voting margin of 55 to 53. A motion for immediate effect prevailed on a voice vote with two-thirds of the House members voting in support. After being modified and approved by the Senate, the House passed the amended version of HB 4929 with a 56-54 vote. HB 4929 was given immediate effect, signed by the Governor, and filed with the Secretary of State on March 16, 2012.

On March 27, 2012, plaintiffs moved for a preliminary injunction and sought mandamus relief to enjoin the immediate effect of HB 4246 and HB 4929. Plaintiffs alleged that the bills had been given immediate effect in violation of the constitution because a roll call vote was not performed. The trial court found that defendants had violated article 4, § 18 and § 27 of the Michigan Constitution. The trial court stated:

> We hear a lot today about transparency. And I think in this particular case the reason that the Constitution probably requires there to be a roll call vote, so that there can be transparency. That works for [sic] both ways so that the public, I do believe, have [sic] a right upon the request of the requisite number of members to know how their

> representative votes, whether they voted for immediate effect or against immediate effect.

After again mentioning that "the [c]ourt is concerned about that transparency," the trial court entered an order for a preliminary injunction, enjoining the immediate effect of the bills. Defendants now appeal.

II. PLAINTIFFS' ALLEGATIONS

The Michigan Constitution provides that "[e]ach house, except as otherwise provided in this constitution, shall choose its own officers and determine the rules of its proceedings," and that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 4, § 16; art 3, § 2. A general challenge to the governing procedures in the House of Representatives is not appropriate for judicial review. See *Mich Taxpayers United, Inc v Governor*, 236 Mich App 372, 379; 600 NW2d 401 (1999). The House rules require that motions for immediate effect be resolved with a rising vote, and that a roll call vote be made orally. Plaintiffs stated at oral argument that they have no quarrel with the rules of the House. Rather, they assert that under article 4, § 27, motions for immediate effect are required to be resolved by a roll call vote, and that article 4, § 18 prohibits a requirement that motions for immediate effect and for a roll call vote be made orally. Plaintiffs further allege that defendants' application of these provisions is unconstitutional and has resulted in a reduction in their effectiveness as legislators. This, they also allege, has served to nullify the effect of their votes as members of the House of Representatives. At oral argument, defendants conceded for purposes of this appeal that plaintiffs have standing as to these specific claims of constitutional violations. Thus, we address the merits of this appeal, recog-

nizing the admonition of our Supreme Court in *Straus v Governor*, 459 Mich 526, 531; 592 NW2d 53 (1999):

> We cannot serve as political overseers of the executive or legislative branches, weighing the costs and benefits of competing political ideas or the wisdom of the executive or legislative branches in taking certain actions, but may only determine whether some constitutional provision has been violated by an act (or omission) of the executive or legislative branch. As has been long recognized, when a court confronts a constitutional challenge it must determine the controversy stripped of all digressive and impertinently heated veneer lest the Court enter—unnecessarily this time—another thorny and trackless bramblebush of politics. [Quotation marks and citations omitted.]

III. APPROPRIATENESS OF THE PRELIMINARY INJUNCTION

A. STANDARD OF REVIEW

We review for an abuse of discretion the trial court's decision to grant a preliminary injunction. *Oshtemo Charter Twp v Kalamazoo Co Rd Comm*, 288 Mich App 296, 302; 792 NW2d 401 (2010). " '[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes.' " *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 146; 809 NW2d 444 (2011), quoting *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). "Questions of constitutional interpretation . . . are questions of law reviewed de novo by this Court." *Dep't of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008).

B. TEST FOR PRELIMINARY INJUNCTION

The purpose of a preliminary injunction is to preserve the "status quo pending a final hearing regarding the parties' rights." *Mich AFSCME Council 25*, 293

Mich App at 145 (quotation marks and citation omitted). "A court's issuance of a preliminary injunction is generally considered equitable relief." *Id.* To obtain a preliminary injunction, the moving party "bears the burden of proving that the traditional four elements favor the issuance of a preliminary injunction." *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008). This four-part test involves the trial court's determination that

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Mich AFSCME Council 25*, 293 Mich App at 148 (quotation marks and citation omitted).]

Thus, we must determine whether the trial court properly concluded that plaintiffs met their burden under this test.

C. LIKELIHOOD OF SUCCESS ON THE MERITS

We find that plaintiffs fail to demonstrate that they are likely to prevail on the merits of their claim. While the trial court found that success on the merits was highly likely because constitutional "transparency" prevails over the governing rules in the House of Representatives, that reasoning is flawed.

"[T]he primary and fundamental rule of constitutional or statutory construction is that the Court's duty is to ascertain the purpose and intent as expressed in the constitutional or legislative provision in question." *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010) (quotation marks and citation omitted). "This Court typi-

cally discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification." *Wayne Co v Hathcock*, 471 Mich 445, 468-469; 684 NW2d 765 (2004). We must "give effect to the common understanding of the text," *Lansing v Michigan*, 275 Mich App 423, 430; 737 NW2d 818 (2007), and avoid an interpretation that creates "a constitutional invalidity." *Mich United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359, 411; 630 NW2d 297 (2001) (CAVANAGH, J., dissenting).

Article 4, § 27 of the Michigan Constitution states that "[n]o act shall take effect until the expiration of 90 days from the end of the session at which it was passed, *but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house.*" (Emphasis added). The plain language of § 27 does not specifically mandate or require the taking of a record roll call vote. Because other sections of the Constitution do specifically provide for a roll call vote, see, e.g., Const 1963, art 4, § 26 (stating that the names and the vote of the members in each house must be entered in the journal on the final passage of a bill); Const 1963, art 4, § 17 (requiring that committees in each house of the Legislature must use the roll call vote for action on all bills), we are led to conclude that the omission of any reference to a roll call vote in § 27 was intentional. See *Bush v Shabahang*, 484 Mich 156, 169; 772 NW2d 272 (2009) (noting that courts cannot assume that the language chosen by the Legislature is inadvertent). Thus, to interpret § 27 to require a roll call vote despite the complete absence of language supporting such a conclusion would violate the principles of constitutional interpretation.

We are well aware that "[e]very provision in our constitution must be interpreted in light of the document as a whole[.]" *AFSCME Council 25 v State Em-*

ployees' Retirement Sys, 294 Mich App 1, 9; 818 NW2d 337 (2011). Therefore, we turn to article 4, § 18 of the Constitution, which states:

> Each house shall keep a journal of its proceedings, and publish the same unless the public security otherwise requires. *The record of the vote and name of the members of either house voting on any question shall be entered in the journal at the request of one-fifth of the members present.* Any member of either house may dissent from and protest against any act, proceeding or resolution which he deems injurious to any person or the public, and have the reason for his dissent entered in the journal. [Emphasis added.]

While plaintiffs conclude that this section definitively supports that they had a constitutional right to a roll call vote, a careful reading contradicts this assertion. Article 4, § 18 does not delineate any particular method required to obtain the one-fifth vote necessary to obtain a roll call vote. Rather, it merely requires that if one-fifth of the members request a roll call vote, a roll call vote shall be taken. Since the Constitution is silent regarding the method for obtaining a one-fifth vote for a roll call vote, it is within the House's discretion to formulate its own rules and procedures regarding this issue. See Const 1963, art 4, § 16 (stating that each house shall choose its own officers and determine the rules of its proceedings). Significantly, there is no indication in the Journal of the House that a one-fifth vote requesting a roll call vote was obtained for either HB 4246 or HB 4929. As this Court has previously ruled, "the Journals of the House and Senate are conclusive evidence of those bodies' proceedings, and when no evidence to the contrary appears in the journal, we will presume the propriety of those proceedings." *Mich Taxpayers United*, 236 Mich App at 379.[1] Thus, there is

[1] Plaintiffs contend that Representative Kate Segal intended to request a one-fifth vote for a roll call vote and that a sufficient number of

no evidence suggesting that the defendants violated this provision of the Constitution.

Further, the Constitution contains no language supporting the trial court's anecdotal opinion that because "[w]e hear a lot today about transparency . . . the Constitution *probably* requires there to be a roll call vote, so that there can be transparency." (Emphasis added). Because the trial court's finding is devoid of constitutional support, we conclude that the trial court erred.

In short, we reject plaintiff's contention that the Constitution was violated by defendants. The constitutional provisions at issue permit the manner in which they are applied to be determined by adoption of the rules of the House, which plaintiffs concede they do not challenge, and which we do not oversee. *Straus*, 459 Mich at 531; *Mich Taxpayers United*, 236 Mich App at 379.

D. IRREPARABLE HARM

An alternate basis justifying reversal of the trial court's decision is that plaintiffs failed to demonstrate that they would suffer irreparable harm if a preliminary injunction was not obtained. As the moving party, plaintiffs bore the burden of establishing the existence of an irreparable harm. *Detroit Fire Fighters Ass'n*, 482 Mich at 34. It is "well settled that an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjec-

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members were prepared to vote in favor. To support this claim, plaintiffs offer a list of those members whom they say were in support of Representative Segal's request. Yet the House Journal conclusively shows that no roll call vote request was made and such a vote did not take place. Because the Journal of the House is conclusive and "[p]arol evidence may not be used to show that the Legislature violated the constitution in enacting a statute," *Mich Taxpayers United*, 236 Mich App at 379, plaintiffs' arguments are meritless.

tural." *Mich AFSCME Council 25*, 293 Mich App at 149 (quotation marks and citation omitted). A party must demonstrate "a particularized showing of irreparable harm" and "[t]he injury is evaluated in light of the totality of the circumstances affecting, and the alternatives available to, the party seeking injunctive relief." *Id.*

Plaintiffs' generalized argument that a constitutional violation would result in harm is insufficient because it is not particularized. Moreover, plaintiffs' ability to vote and the effectiveness of their vote have not been impaired. Plaintiffs had, and continue to have, the ability to request a roll call vote as long as they follow the procedures established by the House of Representatives and amass one-fifth support for such a motion. Because their failure to achieve a one-fifth vote in this case is not a result of a constitutional violation, they have failed to identify an irreparable harm.

Plaintiffs' assertion that their constituents were harmed because of the effect on referendums is also unfounded. Article 2, § 9 of the Constitution states that

> [t]he people reserve to themselves the power . . . to approve or reject laws enacted by the legislature, called the referendum. . . . The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted.

Nothing in the language of this section or in article 4 § 27 implies that the people's right to a referendum has been impaired. The power of a referendum can be invoked within 90 days of the final adjournment of the legislative session and nothing implies that the immediate effect of the law infringes upon the right to a

referendum. As this Court held in *Frey v DSS Dir*, 162 Mich App 586, 601-602; 413 NW2d 54, aff'd 429 Mich 315 (1987):

> Plaintiffs' argument that giving the act immediate effect would impair their right to referendum is without merit. Under article 2, § 9, referendum must be invoked within ninety days of the final adjournment of the legislative session at which the law was enacted. Whether the law was given immediate effect is irrelevant.

Thus, plaintiffs have failed to demonstrate that they will suffer irreparable harm if an injunction is not issued. *Mich AFSCME Council 25*, 293 Mich App at 148-149.

IV. CONCLUSION

The trial court erred by granting the preliminary injunction. Because plaintiffs failed to demonstrate a likelihood of success on the merits or to establish irreparable harm, we reverse the trial court's order, vacate the preliminary injunction, and remand for an order of dismissal. We do not retain jurisdiction.

There are no costs, a public question being involved. We do not retain jurisdiction. This opinion is to have immediate effect pursuant to MCR 7.215(F)(2).

TALBOT, P.J., and WILDER, J., concurred with RIORDAN, J.

FRANKFURTH v DETROIT MEDICAL CENTER

Docket No. 305500. Submitted May 8, 2012, at Detroit. Decided August 23, 2012, at 9:00 a.m.

Dianna R. Frankfurth, as personal representative of the estate of Matthew Frankfurth, deceased, brought an action in the Wayne Circuit Court against Detroit Medical Center, Harper-Hutzel Hospital, Randy Alan Lieberman, M.D., Heart Care, P.C., and Keith Atkinson, D.O. Defendants moved for a change of venue to Oakland County. The court, Amy P. Hathaway, J., granted the motion. Plaintiff moved for reconsideration, filing the motion in the Wayne Circuit Court. The court granted the motion for reconsideration, concluding that venue was proper in Wayne County. The Court of Appeals granted the application for leave to appeal by Detroit Medical Center, Harper-Hutzel Hospital, Lieberman, and Heart Care.

The Court of Appeals *held*:

Under MCL 600.1651, an action brought in a county not designated as a proper county may nevertheless be tried there, unless a defendant moves for a change of venue within the time and in the manner provided by court rule, in which case the court must transfer the action to a proper county on such conditions relative to expense and costs as provided by court rule and MCL 600.1653. The court for the county to which the transfer is made thereupon has full jurisdiction of the action as though the action had been originally commenced there. Under MCL 600.1653, the transferor court must impose certain expenses on the party who opposed the motion to change venue. MCL 600.1653 does not affect the operation of MCL 600.1651. Under MCR 2.223(B), the court is to order the change of venue at the plaintiff's expense, including reasonable attorney fees, and, if those expenses are not paid within a particular time, the action must be dismissed by the court to which it was transferred. This rule recognizes the difference between the essentially residual jurisdiction to evaluate the costs to be imposed for the transfer—reserved to the transferor court—and the jurisdiction to take any substantive action in the matter—belonging to the transferee court. Unless otherwise explicitly

specified, orders are effective when signed by the judge. Thus, a validly entered order for a change of venue divests the ordering court of its jurisdiction and transfers that jurisdiction to the designated venue when it is signed. Any subsequent motions in the case, including one for reconsideration of the order changing venue, must be made in the transferee court. Under MCR 2.119(F)(1), a specific period is provided within which a motion for rehearing or reconsideration must be served and filed. It would be sensible for courts to reserve jurisdiction over motions for rehearing or reconsideration of orders changing venue for the period specified by MCR 2.119(F), but the rule does not require that orders remain pending for any period or that motions for rehearing or reconsideration be heard by the court that originally decided the motion. In this case, the order changing venue contained no conditions that prevented it from taking effect when signed, and thus the Wayne Circuit Court no longer had jurisdiction when plaintiff moved for reconsideration. Under the circumstances, the court acted without jurisdiction and improperly granted reconsideration.

Reversed.

SAAD, J., concurred in the result only.

COURTS — VENUE — CHANGE OF VENUE — JURISDICTION — MOTIONS FOR REHEARING OR RECONSIDERATION.

A validly entered order for change of venue divests the ordering court of its jurisdiction and transfers that jurisdiction to the designated venue when it is signed; although the transferor court has residual jurisdiction to evaluate the costs to be imposed for the transfer, any subsequent motions in the case, including one for reconsideration of the order changing venue, must be made in the transferee court; a transferor court may, however, reserve jurisdiction over motions for rehearing or reconsideration of orders changing venue by making the transfer effective after the period specified by MCR 2.119(F) for filing and serving motions for rehearing or reconsideration (MCL 600.1651).

Sommers Schwartz, P.C. (by *Charles R. Ash, III*, and *Danielle C. Schoeny*), for Dianna R. Frankfurth.

Corbet, Shaw, Essad, Tucciarone & Bonasso, PLLC (by *Daniel R. Corbet* and *Joshua O. Booth*), for Detroit Medical Center, Harper-Hutzel Hospital, Randy A. Lieberman, M.D., and Heart Care, P.C.

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

RONAYNE KRAUSE, P.J. Defendants[1] appeal by leave granted the trial court's order granting plaintiff's motion for reconsideration of the trial court's order granting defendants' motion to change venue to Oakland County. Defendants contend that because the trial court had entered an order changing the venue, it lost jurisdiction to entertain any further proceedings, including a motion for reconsideration. We agree and reverse.

We review de novo whether a court has jurisdiction. *City of Riverview v Sibley Limestone*, 270 Mich App 627, 636; 716 NW2d 615 (2006). A jurisdictional challenge may be raised at any time. *Smith v Smith*, 218 Mich App 727, 729-730; 555 NW2d 271 (1996). We also review de novo questions of statutory interpretation. *Grimes v Mich Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). "The main goal of judicial construction of a statute is to ascertain and to give effect to the intent of the Legislature." *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 39; 761 NW2d 269 (2008) (citation and quotation marks omitted). We apply the same principles of interpretation to court rules as we do to statutes. *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005). Accordingly, we begin by examining the language of the relevant statutes and court rules. See *id*. at 705.

We initially note that the leading case on point, and on which defendants rely, was decided before the "first-out rule," MCR 7.215(J)(1), and cited a subsequently amended statute. We therefore take heed of plaintiff's

[1] Because Keith Atkinson is not participating in this appeal, by "defendants" we refer only to Detroit Medical Center, Harper-Hutzel Hospital, Randy A. Lieberman, and Heart Care, P.C.

argument that it is not necessarily binding on us per se. However, we conclude that, as defendants argue, it is correct and the law would obligate us to follow its result in any event.

In *Saba v Gray*, 111 Mich App 304, 306-307; 314 NW2d 597 (1981), the defendant filed a motion to change venue from Wayne County to Monroe County; the trial court granted that motion and then entered an order over the plaintiff's objections. The plaintiff then moved for rehearing, which the trial court ultimately granted, concluding that venue was proper in Wayne County. *Id*. at 307. This Court observed that although the trial court had subject-matter jurisdiction over the kind of action at issue, the trial court did not have jurisdiction to exercise authority over a case pending in another circuit court. *Id*. at 308. This Court relied in part on MCL 600.1651, which, as it was then written,[2] provided:

> An action brought in a county not designated as a proper county may nevertheless be tried therein, unless a defendant moves for a change of venue within the time and in the manner provided by court rule, in which case the court shall transfer the action to a proper county on such conditions relative to expense and costs as may be provided by court rule. The court of the county to which the transfer is made shall thereupon have full jurisdiction of the action as though the action had been originally commenced therein.

This Court noted that although the trial court's clerk may not have entirely complied with the relevant court rule's procedural dictates concerning written objections to the proposed order, the relevant court rule's purpose was to ensure that an order comporting with the judge's decision was entered, and because the judge had executed and entered such an order, the order was valid. *Saba*, 111 Mich App at 310-311. Because the order was

[2] See 1961 PA 236.

validly entered, the Wayne Circuit Court lost jurisdiction and any subsequent motions had to be filed in the Monroe Circuit Court. *Id*. at 311-312. This Court observed that it would be possible for the transferor court to make an order granting a change of venue effective some reasonable number of days after entry, in which case it would retain jurisdiction to entertain a motion for rehearing or reconsideration during that period, but the trial court in *Saba* had not done so. *Id*. at 312.

Pursuant to 1986 PA 178, MCL 600.1651 now provides:

> An action brought in a county not designated as a proper county may nevertheless be tried therein, unless a defendant moves for a change of venue within the time and in the manner provided by court rule, in which case the court shall transfer the action to a proper county on such conditions relative to expense and costs as provided by court rule and section 1653. The court for the county to which the transfer is made shall have full jurisdiction of the action as though the action had been originally commenced therein.

The only change that is not obviously purely stylistic is that instead of transferring the action "on such conditions relative to expense and costs as may be provided by court rule," the transferring court must now do so "on such conditions relative to expense and costs as provided by court rule and section 1653."

Plaintiff argues that the new reference to MCL 600.1653 is significant. We disagree. Nothing in the amendment changes the fact that after the change of venue becomes effective, the transferee court has full jurisdiction of the action; consequently, the transferor court has none. Both versions of the statute explicitly reserve jurisdiction to the transferor court to impose "conditions relative to expense and costs." Under MCL 600.1653, in relevant part, the transferor court must impose certain expenses on the party who opposed the

motion after affording that party a hearing. MCL 600.1653 makes no reference, express or implied, to jurisdiction, venue, or the relationship between a court's duty to assess costs and jurisdiction. The new reference to MCL 600.1653 is, in short, nothing more than the identification of a particular provision pursuant to which costs should be determined. Its addition to MCL 600.1651 does not substantively change the operation of MCL 600.1651 itself.

Under GCR 1963, 404 when *Saba* was decided, and presently under MCR 2.223(B), "the court" is to order the change of venue at cost to the plaintiff, "which may include reasonable compensation for the defendant's expense, including reasonable attorney fees," and if those expenses are not paid within a particular time, the action is to "be dismissed by the court to which it was transferred." The court rules, therefore, have at all relevant times recognized there is a difference between the essentially residual jurisdiction to evaluate the costs to be imposed for the transfer—reserved to the transferor court—and the jurisdiction to take any kind of substantive action in the matter—belonging only to the transferee court.

Under MCR 2.119(F)(1), a specific period[3] is now provided within which "a motion for rehearing or reconsideration of the decision on a motion must be served and filed . . . ." MCR 2.119(F) was a new provision in 1985, but *Saba* indicates that motions for rehearing were nevertheless available before that time; and GCR 1963, 528[4] permitted judges to grant motions for relief from orders made within a reasonable time, and GCR 1963, 527[5] permitted judges to grant motions

[3] Twenty-one days as of the 2008 amendment of the court rule.

[4] Generally now incorporated into MCR 2.612.

[5] Generally now incorporated into MCR 2.611.

for new trials and amendment of judgments made within 20 days. More importantly, nothing in MCR 2.119(F), or any other past or present rule that we have found, suggests, or to the best of our research has ever been construed as suggesting, that it renders orders automatically ineffective until the expiration of some time period. Indeed, unless otherwise explicitly specified, orders are effective when signed by the judge. *Moriarity v Shields*, 260 Mich App 566, 570-571; 678 NW2d 642 (2004). Nothing in MCR 2.119(F) appears jurisdictional in nature. See *Bers v Bers*, 161 Mich App 457, 463; 411 NW2d 732 (1987).

A plain reading of MCR 2.119(F) provides a right to move for rehearing or reconsideration, but it does not reveal any requirement that orders remain pending for any period. We also find somewhat instructive this Court's analysis of MCR 2.227(B)(1), under which after the transfer of an action for lack of jurisdiction in the original court, "[t]he action proceeds in the court to which it is transferred as if it had been originally filed there." While applicable in a substantially different situation, this language is strikingly similar to the second sentence of MCL 600.1651. After a transfer under MCR 2.227, " 'the rulings of the original court become, in effect, the rulings of the new court.' " *Brooks v Mammo*, 254 Mich App 486, 497; 657 NW2d 793 (2002) (citations omitted). We think the same result must be achieved by the similar language of MCL 600.1651.

Moreover, neither the amendment to MCL 600.1651 nor any part of MCL 600.1653 in any way suggests that the Legislature was attempting to grant the trial court jurisdictional authority to decide substantive issues like a motion for reconsideration after a change of venue. In effect, that would be a grant of permission to one court to interfere in the rulings of another. Rather, MCL 600.1653

only reflects the Legislature's decision that a trial court can decide the issue of costs after granting the change of venue, and "courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature." *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003) (citation and quotation marks omitted). We have found no statutes or other applicable court rules governing motions for reconsideration. The *Saba* Court's reading of the statute is the only reading that is rationally possible: once a transfer of venue is made, the transferee court has full jurisdiction over the action and, therefore, the transferor court has none.[6] Any motion for rehearing or reconsideration would have to be heard by whichever court has jurisdiction over the action at the time the motion is brought, which, after entry of an order changing venue, would be the transferee court.

We note it is possible that the transferee court may, out of deference to the transferor court or for some other reason, simply not entertain a motion to reconsider a decision made by the transferor court. However, in the event the transferee court denied a party the right to have its motion for reconsideration entertained, the transferee court would be immediately subject to superintending control by this Court. MCR 7.203(C)(1). Consequently, we are not concerned that a party will be absolutely unable to have its motion for reconsideration entertained.

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[6] While legislative bill analyses are generally not favored as a way to gain insight into statutes, we note that 1986 PA 178 amended many statutory sections with the overall purpose of discouraging frivolous claims and defenses by awarding costs to prevailing parties. House Legislative Analysis, HB 5154, January 15, 1986. This supports our conclusion, which is based on a plain reading of the text of the statute, that the amendment to MCL 600.1651 was intended only to enhance the court's already extant obligation to evaluate and impose costs on the plaintiff in the event venue is transferred.

In summary, we believe that the *Saba* Court's analysis was correct and has not been affected by the subsequent amendment of MCL 600.1651. We note also that according to the trial court's register of actions, the entry for June 13, 2011, states "**Closed – Motion for Change of Venue Granted, Order to Follow** . . . ." On that same day, there is an entry reflecting the trial court's order granting the change of venue. Nothing in the change of venue order or the trial court record indicates that the change of venue would not take effect immediately or would not take effect until a decision about costs had been rendered. We do not doubt that this may prove to be a serious inconvenience, and so the better practice might be to make orders changing venue effective as of some reasonable time thereafter, as *Saba* suggested. *Saba*, 111 Mich App at 312. But because no such delayed effect was included in the order here, the change of venue had immediate effect, and the trial court was therefore immediately divested of any jurisdiction to entertain the motion for reconsideration or any other substantive issue other than the costs and expenses relative to the transfer.

We therefore need not consider defendants' alternative argument that the trial court abused its discretion by granting the motion for reconsideration.

Reversed.

BORRELLO, J., concurred with RONAYNE KRAUSE, P.J.

SAAD, J. (*concurring*). I concur in the result only.

JILEK v STOCKSON (ON REMAND)

Docket No. 289488. Submitted March 28, 2012, at Lansing. Decided August 28, 2012, at 9:00 a.m.

Joy A. Jilek, as personal representative of the estate of Daniel D. Jilek, deceased, brought a medical-malpractice action in the Washtenaw Circuit Court against board-certified family-medicine physician Carlin C. Stockson, M.D.; EPMG of Michigan, P.C., which was Stockson's employer; Trinity Health-Michigan; and others, related to Stockson's treatment of Daniel at an urgent-care center. Plaintiff submitted interrogatories to defendants regarding defendants' expert witnesses, but defendants did not respond. A few weeks before trial, plaintiff moved to bar the expert witnesses' testimony because of the failure to respond to the interrogatories. Defendants' lawyer then sent letters to plaintiff summarizing the qualifications and anticipated testimony of the witnesses. The court, David S. Swartz, J., denied the motion to bar the witnesses on the basis that the letters contained sufficient information to substantively respond to the interrogatories. The jury returned a verdict of no cause of action in favor of Stockson and EPMG. Plaintiff appealed. The Court of Appeals, BORRELLO, P.J., and DONOFRIO and SHAPIRO, JJ., reversed and remanded for a new trial, concluding that the trial court had erred in the disposition of issues relating to the applicable standard of care. 289 Mich App 291 (2010). In lieu of granting leave to appeal, the Supreme Court reversed the judgment of the Court of Appeals, concluding that the trial court had correctly ruled upon the issues related to the appropriate standard of care. The Supreme Court remanded the case to the Court of Appeals for consideration of plaintiff's assertion that the trial court had improperly permitted defendants' expert witnesses to testify. 490 Mich 961 (2011).

On remand, the Court of Appeals *held*:

MCR 2.309(B) requires that each interrogatory be separately answered under oath. The rule also sets forth the procedural and formatting requirements for providing the answers. When a party fails to answer an interrogatory, MCR 2.309(C) permits opposing counsel to move for an order compelling discovery under MCR 2.313(A). MCR 2.313(B) permits the court to order sanctions when

a party has failed to obey an order to provide or permit discovery. In the absence of an agreement to accept a letter from counsel in lieu of actual signed answers to interrogatories, the provision of such a letter does not constitute compliance with MCR 2.309(B). The trial court improperly found that defense counsel's letters were an adequate substitute for answers to the interrogatories, and plaintiff would have been entitled to relief had she filed a motion to compel under MCR 2.309(C). However, plaintiff failed to file a motion to compel answers so there was no violation of MCR 2.313(B), and plaintiff failed to specifically describe how she was prejudiced. Further, the court implicitly imposed a sanction by limiting the expert witnesses' testimony to the content of the letters, which was sufficient under the circumstances.

Affirmed.

PRETRIAL PROCEDURE — CIVIL PROCEDURE — DISCOVERY — INTERROGATORIES — ANSWERS — LETTER — FAILURE — EFFECT.

In the absence of an agreement to accept a letter from counsel in lieu of actual signed answers to interrogatories, the provision of such a letter does not constitute compliance with MCR 2.309(B).

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Davis & Kuhnke, P.C.* (by *Peter A. Davis* and *Carol A. Kuhnke*), for Joy A. Jilek.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Noreen L. Slank*), for Carlin C. Stockson, M.D., and EPMG of Michigan, P.C.

ON REMAND

Before: BORRELLO, P.J., and DONOFRIO and SHAPIRO, JJ.

PER CURIAM. This medical malpractice case was tried, and the jury returned a verdict of no cause of action. This Court reversed and remanded for new trial. *Jilek v Stockson*, 289 Mich App 291; 796 NW2d 267 (2010). Our decision was, in turn, reversed by the Supreme Court. *Jilek v Stockson*, 490 Mich 961 (2011). Having reversed

this Court's opinion, the Supreme Court remanded the case for us to consider plaintiff's remaining argument, i.e., whether the trial court erred in its ruling on plaintiff's motion to bar defendants' experts from testifying in light of defendants' failure to answer expert witness interrogatories.

The standard of review for decisions regarding sanctions for discovery violations is abuse of discretion. *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 618; 550 NW2d 580 (1996). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

Plaintiff originally submitted interrogatories regarding defendants' anticipated expert witnesses in 2005. Defendants provided no formal response. A few weeks before trial, plaintiff brought a motion to strike two witnesses from defendants' witness list because of defendants' failure to respond to the interrogatories. Defendants replied by sending plaintiff's counsel a letter enclosing the curriculum vitae of the experts and offering the following information:

> Dr. Jameson possesses a Doctor of Pharmacy degree and is a Professor at Ferris State University in addition to providing training to medical residents at Michigan State University.
>
> It is anticipated that Dr. Jameson will testify that utilization of Albuterol, in the form and manner prescribed by Dr. Stockson, is not known to have caused or induced negative/harmful/fatal cardiac response or sequela and that there is an absence of support in the medical literature, to link the prescribing of Albuterol in the manner ordered here, to coronary/cardiac misadventure in patient's [sic] who present with a history similar to that of Mr. Jilek.

> Dr. Steven Almany is a board certified interventional cardiologist. It is anticipated that Dr. Almany will testify that the prescribing of Albuterol in the format/dosage/manner instituted in this case, based on his experience, is an acceptable and known form of treatment.
>
> Further, that while there may be a theoretical risk in the prescribing of Albuterol in certain forms, with the possibility of an increase in heart rate being present, this medication is routinely given to patients who are known to have cardiac disease, including patients in the intensive care unit, the critical care unit, and the emergency room, as well as being prescribed to patients on an out-patient basis with known cardiac histories.
>
> It is further anticipated that Dr. Almany will deny and refute that Albuterol was in any way a causative factor in the death of Mr. Jilek and that his death was not foreseeable or related to his visit of March 1st.

After plaintiff responded that the information in this letter was not sufficient to permit plaintiff to prepare for trial, defendants sent a second letter:

> Dr. Almany, per my discussion with you and as indicated on his C.V., is an interventional cardiologist and will testify to the 'theoretical risk' in the prescribing of Albuterol in certain forms and the possibility of an increase in heart rate being present with the utilization of this medication, but that its implementation is wide spread and well known in patients who have a known history of coronary artery disease, including patients who are status post-myocardial infarction and are currently admitted to intensive care units or cardiac care units or are under treatment in emergency departments. This medication is also implemented in patients who have known cardiac disease and are being treated for respiratory difficulty on an out-patient, as well as in-patient, basis.
>
> Dr. Almany will testify that the patient's demise was not the result of an inappropriate prescribing and/or administration of Albuterol and that based upon his training, background and experience, the patient's death and/or

even the discovery of a lesion may not have been prevented or preventable even had a cardiac work-up been implemented.

Further, it is Dr. Almany's position that the events of March 1st are not causally linked to the patient's demise on March 6th.

Dr. Almany has set his fees at $350.00 per hour for review and $500.00 per hour for deposition with a two hour minimum.

Dr. Jameson, like Dr. Almany, was initially contacted in 2006 and was provided with copies of the Complaint, the affidavits of merit executed by your experts and the copy of the Maple Urgent Care medical record of March 1st. They were each provided with copies of the autopsy as well.

Over time these experts have been provided with transcripts of your experts' depositions and it is the intention of defendant to call each of these experts at trial.

Dr. Jameson, in addition to being a Professor of Pharmacy, makes rounds with residents in the Family Practice Program at Michigan State University and participates in the training of these physicians with reference to the prescribing of medications.

Based on his pharmacology training and his experience in the residency program at Michigan State University, Dr. Jameson is expected to provide testimony with reference to the utilization of Albuterol and the absence of a known and/or accepted awareness of Albuterol, in the manner prescribed in this case, causing cardiac injury to patients who present with a history such as Mr. Jilek.

The testimony anticipated from each of these witnesses will be based on their respective educational backgrounds, professional and active practices, as well as the medical records generated in this case.

As indicated, Dr. Jameson will also testify as to the absence of medical literature generally known and/or published at the time Mr. Jilek was treated that would reflect or support a claim that Albuterol, when administered as

> prescribed in this case, has a known and/or accepted history of causing cardiac injury in patients such as Mr. Jilek.

At the hearing on plaintiff's motion to strike the witnesses, the trial court denied the motion, concluding that the two letters sent by defense counsel contained sufficient information to substantively respond to plaintiff's interrogatories and, therefore, that the sanction of striking the witnesses was not warranted.

At trial, before the subject witnesses were called to testify, plaintiff's counsel again raised the issue and requested that the witnesses be barred from offering any opinions or testimony not disclosed in counsel's letters. The trial court agreed and directed that the testimony be so limited. Plaintiff does not refer us to any specific testimony that went beyond that limitation.

Plaintiff is correct that in the absence of an agreement to accept a letter from counsel in lieu of actual signed answers to interrogatories, provision of such a letter does not constitute compliance with MCR 2.309(B) and plaintiff would have been entitled to relief had she filed a motion to compel pursuant to MCR 2.309(C).[1] However, plaintiff did not file a motion to compel answers and so defendant did not violate MCR 2.313(B).[2] Moreover, while plaintiff's brief makes general assertions of prejudice, no specific prejudice has been described. Finally, by limiting the scope of the

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[1] MCR 2.309(B) requires that each interrogatory be separately answered under oath. The rule also sets forth the procedural and formatting requirements for providing the answers. MCR 2.309(C) permits a party to move for an order compelling discovery under MCR 2.313(A) when a party has failed to answer an interrogatory.

[2] MCR 2.313(B) permits the court to order sanctions when a party has failed to obey an order to provide or permit discovery.

expert witnesses' testimony to the content of the letters, the court, by implication, imposed a sanction, which was sufficient under the facts of this case and fell within the range of principled outcomes.

Affirmed.

BORRELLO, P.J., and DONOFRIO and SHAPIRO, JJ., concurred.

PEOPLE v BROWN

Docket No. 303371. Submitted April 11, 2012, at Grand Rapids. Decided August 28, 2012, at 9:05 a.m.

Anthony Ryan Brown was convicted after a bench trial in the Ottawa Circuit Court of manufacturing less than 5 kilograms or fewer than 20 plants of marijuana, MCL 333.7401(2)(d)(*iii*). The police had obtained a search warrant for defendant's home on the basis of a tip that defendant had grow lights, ventilation fans and marijuana plants in his home, and that a piece of fresh marijuana had been found by the police in a trash bag in front of defendant's house that had also contained two pieces of mail addressed to defendant's confirmed address. Defendant moved to suppress the evidence obtained during the execution of the search warrant, arguing that the warrant was invalid because the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., made it legal to grow certain amounts of marijuana and therefore the statement that defendant had been growing marijuana was insufficient to provide the police officers with probable cause that a crime had been committed. The court agreed that the police lacked probable cause to obtain the search warrant because there were no facts in the search-warrant affidavit from which a magistrate could conclude that possession of the marijuana was not legal under the MMMA. However, the court did not suppress the evidence, concluding that it was admissible under the good-faith exception to the exclusionary rule. Defendant moved for reconsideration, which the court denied. Defendant appealed.

The Court of Appeals *held*:

A search warrant may only be issued upon a showing of probable cause. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651(1). Probable cause to issue a search warrant exists if there is a substantial basis for inferring a fair probability that evidence of a crime exists in the stated place. The possession, manufacture, use, creation, and delivery of marijuana are still illegal in Michigan after the enactment of the MMMA. The MMMA did not abrogate state criminal prohibitions of the manufacturing of marijuana, but merely provided a procedure by which seriously ill individuals using marijuana for specified medical purposes can be identified

and protected from prosecution under state law. To establish probable cause, a search-warrant affidavit does not have to provide facts from which a magistrate could conclude that a suspect's marijuana-related activities are specifically not legal under the MMMA. There was probable cause to issue a search warrant on the basis of the information contained in the police officer's affidavit. To establish probable cause the officer was not required to prove that defendant's alleged possession and manufacture of marijuana were not protected from prosecution under the MMMA. The trial court reached the correct result for the wrong reason.

Affirmed.

SEARCHES AND SEIZURES — MEDICAL MARIJUANA — AFFIDAVITS — SUFFICIENCY.

The possession, manufacture, use, creation, and delivery of marijuana are still illegal in Michigan after the enactment of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*.; the MMMA did not abrogate state criminal prohibitions of the manufacturing of marijuana, but merely provided a procedure by which seriously ill individuals using marijuana for specified medical purposes can be identified and protected from prosecution under state law; to establish probable cause to issue a search warrant, the supporting affidavit does not have to provide facts from which a magistrate could conclude that a suspect's marijuana-related activities are specifically not legal under the MMMA.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Ronald J. Frantz*, Prosecuting Attorney, and *Gregory J. Babbit*, Assistant Prosecuting Attorney, for the people.

Frank E. Stanley for defendant.

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM. Defendant, Anthony Ryan Brown, appeals as of right his conviction, following a bench trial, of manufacturing less than 5 kilograms or fewer than 20 plants of marijuana, MCL 333.7401(2)(d)(*iii*). The trial court sentenced defendant to 30 days in jail (suspended), 2 years' probation, and 100 hours of commu-

nity service. In addition, the trial court imposed a $500 fine and suspended defendant's driver's license for one year. We affirm.

On January 7, 2010, defendant's former roommate, Justin Fielding, contacted police and told West Michigan Enforcement Team Detective David Bytwerk that defendant was growing marijuana in his home in Holland Township. Fielding explained that when he lived with defendant he saw grow lights and ventilation fans installed in the laundry room of the home and small marijuana plants growing under the lights. On February 5, 2010, Bytwerk and another detective searched trash left for pickup on the shoulder of the road in front of defendant's house and found a piece of fresh marijuana in the trash. Bytwerk also found two pieces of mail in the same trash container addressed to defendant. Bytwerk confirmed defendant's address with the Michigan Secretary of State.

Bytwerk included the above facts in his search-warrant affidavit. However, Bytwerk did not check to see if defendant was a qualifying patient or a primary caregiver under the Michigan Medical Marihuana Act (MMMA),[1] MCL 333.26421 *et seq*. Bytwerk explained that he did not check defendant's status under the MMMA because the State Department of Community Health will not provide the police with any information concerning whether a person has a valid MMMA certificate on the basis of the person's name alone. He explained that the Department of Community Health requires an identification number before acknowledging the validity of a certificate.

A magistrate approved the search warrant on February 5, 2010. That same day, Bytwerk and other police

[1] The act uses the spelling "marihuana," but we employ the more common spelling "marijuana" in this opinion.

officers executed the search warrant at defendant's home. The officers found eight marijuana plants and two grams of marijuana.

On July 7, 2010, defendant moved to dismiss the case and for a hearing to suppress the evidence obtained during the execution of the search warrant. At the motion hearing defendant argued that the evidence seized during the search should be suppressed because the search warrant was invalid. Defendant claimed that the MMMA made it legal to possess and grow certain amounts of marijuana and, thus, the statement in the affidavit that defendant was growing marijuana was insufficient to provide the police officers with probable cause that a crime had been committed.

The trial court held that the affidavit did not contain sufficient facts to provide a substantial basis for inferring that a fair probability existed that evidence of a crime would be found in defendant's home. The trial court acknowledged that before the effective date of the MMMA, traces of marijuana constituted sufficient evidence of a crime to support probable cause because possession of marijuana was per se illegal. However, the trial court concluded that after the MMMA became effective, an affidavit must provide specific facts sufficient for a magistrate to conclude that the possession of the marijuana alleged in the affidavit is not legal under the MMMA.

Despite its holding, however, the trial court did not suppress the evidence obtained from the search of defendant's home because the trial court applied the good-faith exception to the exclusionary rule. The trial court found that the officers' belief in the validity of the search warrant was not entirely unreasonable because the warrant was not facially invalid, and before the passage of the MMMA, the facts included in the affida-

vit would have been sufficient to establish probable cause that a crime was committed. The trial court also found no evidence that Bytwerk misled the magistrate and that the magistrate did not wholly abandon his role.

Defendant filed a motion for reconsideration on September 15, 2010. The trial court denied defendant's motion, holding that it was "unreasonable to expect that a law enforcement officer would have known that previously sufficient evidence is no longer sufficient to establish probable cause."

After a bench trial, the trial court found defendant guilty of manufacturing marijuana,[2] and defendant now appeals as of right, challenging the validity of the search.

"A trial court's findings of fact on a motion to suppress are reviewed for clear error, while the ultimate decision on the motion is reviewed de novo." *People v Hrlic*, 277 Mich App 260, 262-263; 744 NW2d 221 (2007).

We find that because the possession, manufacture, use, creation, and delivery of marijuana remain illegal in Michigan[3] even after the enactment of the MMMA, a search-warrant affidavit concerning marijuana need not provide specific facts pertaining to the MMMA, i.e., facts from which a magistrate could conclude that the

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[2] Defendant received a physician certification pertaining to medical-marijuana use on November 20, 2009. Defendant also received a letter from the Department of Community Health on April 6, 2010, explaining that he was approved for a qualifying patient registry identification card. Defendant's identification card indicated that it was issued on February 4, 2010. Nevertheless, the trial court found defendant guilty of manufacturing marijuana. Evidently, defendant did not comply fully with the requirements of the MMMA, although the specifics of the noncompliance are not clear from the present record.

[3] See *People v Bylsma*, 294 Mich App 219, 227; 816 NW2d 426 (2011).

possession, manufacture, use, creation, or delivery is specifically not legal under the MMMA.

A search warrant may only be issued upon a showing of probable cause. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651(1). Probable cause to issue a search warrant exists if there is a substantial basis for inferring a fair probability that evidence of a crime exists in the stated place. *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). Probable cause must be based on facts presented to the issuing magistrate by oath or affirmation, such as by affidavit. *People v Waclawski*, 286 Mich App 634, 698; 780 NW2d 321 (2009).

The trial court acknowledged that before the MMMA became effective, traces of marijuana in a suspect's trash would be sufficient for a magistrate to find that probable cause to search existed. However, the trial court concluded that after the MMMA became effective, possession of marijuana was no longer per se illegal. In concluding that possession of marijuana was no longer per se illegal under the MMMA, the trial court, citing *People v Lemons*, 454 Mich 234, 246 n 15; 562 NW2d 447 (1997), acknowledged that

> where the relevant medical-marijuana law provides an affirmative defense to a crime, the fact that a suspect may have a medical authorization to use and possess marijuana does not negate probable cause . . . . That is because an affirmative defense merely excuses or justifies the defendant's criminal act, it does not negate any elements of the crime.

However, the trial court distinguished between the two MMMA sections that provide protection from criminal liability: MCL 333.26424 and MCL 333.26428. MCL 333.26424 provides a qualifying patient or a primary caregiver who meet the requirements of the MMMA

immunity from arrest, prosecution, or "penalty in any manner." MCL 333.26428 allows a "patient" and a "patient's primary caregiver" to assert the medical purpose for using marijuana as an affirmative defense. The trial court argued that to interpret the MMMA as providing only an affirmative defense would make MCL 333.26424 surplusage or nugatory. Accordingly, the trial court held that the immunities provided to a qualifying patient or a primary caregiver under MCL 333.26424 removed the per se illegality of the possession of marijuana. Thus, the trial court reasoned that evidence of a suspect's mere possession of marijuana was no longer sufficient evidence of a crime to support probable cause. The trial court held that to support a probable cause ruling, "the affidavit must set forth specific facts from which a magistrate can conclude the possession is not legal under the MMMA."

The trial court's holding is inconsistent with this Court's statements in *People v King*, 291 Mich App 503; 804 NW2d 911 (2011), rev'd in part on other grounds by *People v Kolanek*, 491 Mich 382 (2012). In *King*, this Court held that "[b]y its terms, the MMMA does not abrogate state criminal prohibitions of the manufacturing of marijuana." *Id*. at 508-509. This Court went on to describe the MMMA's impact on the Public Health Code:

> Although these individuals [who are seriously ill and are using marijuana for its palliative effects] *continue to violate the Public Health Code by using marijuana*, the MMMA sets forth narrow circumstances under which they can avoid criminal liability. In other words, the MMMA constitutes a determination by the people of this state that there should exist a very limited, highly restricted exception to the statutory proscription against the manufacture and use of marijuana in Michigan. As such, the MMMA grants narrowly tailored protections to qualified persons as defined in the act if the marijuana is grown and used for certain narrowly

> defined medical purposes. Further, the growing of marijuana is tightly constrained by specific provisions that mandate how, where, for what purpose, and how much marijuana may be grown. [*Id*. at 509 (emphasis added).]

Contrary to the trial court's holding, this Court has held that the MMMA does not abrogate state criminal prohibitions related to marijuana. The MMMA as a whole constitutes a "very limited, highly restricted exception to the statutory proscription against the manufacture and use of marijuana in Michigan." *Id*.

The possession, manufacture, use, creation, and delivery of marijuana remain illegal in this state, even after the enactment of the MMMA. Thus, we conclude that to establish probable cause, a search-warrant affidavit need not provide facts from which a magistrate could conclude that a suspect's marijuana-related activities are specifically not legal under the MMMA. Probable cause exists if there is a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the stated place. *Kazmierczak*, 461 Mich 417-418. Defendant has presented no authority indicating that for probable cause to exist, there must be a substantial basis for inferring that defenses do not apply. See, generally, *Lemons*, 454 Mich at 246 n 15 (discussing affirmative defenses).[4] We disagree with the trial court's holding pertaining to probable cause.[5]

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[4] Even if the protection scheme set forth in MCL 333.26424 is not technically viewed as an "affirmative defense," it nonetheless constitutes a "narrowly tailored protection[]" against punishment for a violation of the Public Health Code. *King*, 291 Mich App at 509. The violation itself still exists, see *id*., and thus we disagree that search-warrant affidavits must set forth information indicating that a suspect's marijuana-related activities are specifically not legal under the MMMA.

[5] While we decline, in light of the pertinent case law, to impose an affirmative duty on the police to obtain information pertaining to a person's noncompliance with the MMMA before seeking a search war-

Accordingly, we affirm the trial court on alternative grounds,[6] and defendant's issue regarding the good-faith exception to the exclusionary rule is moot. See *Contesti v Attorney General*, 164 Mich App 271, 278; 416 NW2d 410 (1987) (discussing mootness).

Affirmed.

METER, P.J., and SERVITTO and STEPHENS, JJ., concurred.

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rant for marijuana, if the police do have clear and uncontroverted evidence that a person is in full compliance with the MMMA, this evidence must be included as part of the affidavit because such a situation would not justify the issuance of a warrant. This scheme will reduce any potential (however unlikely) for police overreach in attempting to obtain search warrants.

[6] Contrary to defendant's argument, the prosecutor was not obligated to file a cross-appeal to argue an alternative basis for affirmance. *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999).

RAMBIN v ALLSTATE INSURANCE COMPANY

Docket No. 305422. Submitted July 13, 2012, at Detroit. Decided August 30, 2012, at 9:00 a.m. Leave to appeal sought.

Lejuan Rambin brought an action in the Wayne Circuit Court against Allstate Insurance Company and Titan Insurance Company, seeking payment of no-fault automobile insurance benefits. Plaintiff was injured while operating a stolen motorcycle. Plaintiff had obtained the motorcycle from Andre Smith, who was not the owner. Smith had told plaintiff that he had an extra motorcycle that plaintiff could borrow in order to attend a social event. When plaintiff arrived at Smith's home, Smith gave him the keys to the stolen motorcycle. Plaintiff was injured when he was driving the motorcycle back to Smith's home after the event. Both defendants moved for summary disposition, asserting that plaintiff's claim was barred by the unlawful-taking exclusion, MCL 500.3113(a). The court, Susan D. Borman, J., agreed and granted the motions. Plaintiff appealed.

The Court of Appeals *held*:

Under MCL 500.3113(a), a person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident the person was using a motor vehicle or motorcycle that he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle. Determining the applicability of this statute involves two levels of inquiry: (1) determining whether the taking was unlawful, which entails ascertaining whether the injured individual seeking coverage took the vehicle or engaged in the taking of the vehicle, and (2) if the vehicle was taken unlawfully, determining whether the injured person reasonably believed that he or she was entitled to take and use the vehicle. If the taking was lawful, the MCL 500.3113(a) coverage exclusion does not apply. The statute examines the legality of the taking from the driver's perspective. For a claimant to have taken a vehicle unlawfully, (1) the vehicle must have been taken, (2) the taking of the vehicle must have been unlawful, (3) it must have been the injured claimant who took the vehicle unlawfully, and (4) the injured person must therefore have both taken the vehicle and acted

unlawfully in doing so. An unlawful taking requires some action by the end user of the vehicle contrary to the Michigan Penal Code. In this case, plaintiff did not take the motorcycle in violation of the Michigan Penal Code and he had every reason to believe that he had obtained the vehicle from its rightful owner. Notably, there were no countervailing considerations such as intoxication or joint conduct with the person who actually took the motorcycle from its rightful owner. Under the circumstances, the trial court improperly granted summary disposition for the defendants because there was no unlawful taking under MCL 500.3113(a). There was, therefore, no need to reach the issue whether plaintiff reasonably believed that he was entitled to take and use the vehicle.

Reversed and remanded for further proceedings.

RONAYNE KRAUSE, J., concurring in part and dissenting in part, concurred with the majority's application of *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503 (2012), to the facts of the case and with the relief ordered, agreeing that plaintiff did not take the motorcycle unlawfully. Judge RONAYNE KRAUSE dissented from the majority's analysis of caselaw decided before *Spectrum Health*, concluding that the analysis was unnecessary to a decision in the case.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — COVERAGE EXCLUSIONS — UNLAWFUL TAKING OF MOTOR VEHICLES — WORDS AND PHRASES — UNLAWFUL TAKING.

Under the unlawful-taking exclusion of the no-fault automobile insurance act (MCL 500.3113[a]), a person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident the person was using a motor vehicle or motorcycle that he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle; determining the applicability of this statute involves two levels of inquiry: (1) determining whether the taking was unlawful, which entails ascertaining whether the injured individual seeking coverage took the vehicle or engaged in the taking of the vehicle, and (2) if the vehicle was taken unlawfully, determining whether the injured person reasonably believed that he or she was entitled to take and use the vehicle; if the taking was lawful, the unlawful-taking coverage exclusion does not apply; for a claimant to have taken a vehicle unlawfully, (1) the vehicle must have been taken, (2) the taking of the vehicle must have been unlawful, (3) it must have been the injured claimant who took the vehicle unlawfully, and (4) the injured person must therefore have both taken the vehicle and acted unlawfully in doing so; an

unlawful taking under the coverage exclusion requires some action by the end user of the vehicle contrary to the Michigan Penal Code.

Donald M. Fulkerson and *Bruce K. Pazner* for Lejuan Rambin.

Charles E. Griffiths for Allstate Insurance Company.

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

BOONSTRA, J. Plaintiff, Lejuan Rambin, appeals as of right a circuit court order granting summary disposition to defendants Allstate Insurance Company and Titan Insurance Company in this action for no-fault automobile insurance benefits arising from a collision that occurred while plaintiff was operating a motorcycle. We reverse and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

The material facts are undisputed. Scott Hertzog owned a motorcycle. The motorcycle was stolen on August 4, 2009. On August 22, 2009, Andre Smith told plaintiff that he had an extra motorcycle that plaintiff could ride for a motorcycle club event. Plaintiff went to Smith's house and Smith gave him the keys to Hertzog's stolen motorcycle. Smith told plaintiff that he owned the motorcycle and that plaintiff could use it for the scheduled event at 10:00 p.m. Plaintiff used the motorcycle to attend the social function. While driving the motorcycle to return it to Smith's house, plaintiff collided with a car and was injured.[1]

[1] At the time, plaintiff's Tennessee driver's license had been suspended, and plaintiff had not obtained a valid Michigan license. Plaintiff testified at his deposition that he was aware at the time of the accident that he did not possess a valid license to operate a motorcycle.

Plaintiff filed this action for recovery of no-fault benefits, naming as defendants Allstate, the insurer of a motor vehicle owned by Hertzog, and Titan, which was assigned the claim by the Assigned Claims Facility pursuant to MCL 500.3172.[2] Both defendants moved for summary disposition. Applying what it believed to be controlling caselaw, the trial court agreed that plaintiff's claim was barred by MCL 500.3113(a), and granted defendants' motions.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We conclude, on the basis of our review of the text of MCL 500.3113(a) and the applicable caselaw, that the trial court erred by finding that defendants were entitled to summary disposition. Rather, we find that, under the circumstances presented, plaintiff did not take the motorcycle "unlawfully" within the meaning of MCL 500.3113(a), and that defendants therefore were not entitled to judgment as a matter of law under MCR 2.116(C)(10). Although we conclude that the trial court erred, we note that the error is understandable in light of the tortured path taken in the development of the relevant caselaw as explained later in this opinion.

II. MICHIGAN NO-FAULT EXEMPTION

Plaintiff challenges the trial court's ruling that MCL 500.3113(a) bars his recovery of no-fault benefits. MCL 500.3113 provides, in pertinent part:

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[2] It appears from the record that the motor vehicle with which plaintiff collided was uninsured. Third-party defendant AAA of Michigan, the insurer of a relative with whom plaintiff resided, was added to the case by defendant Allstate, as a potential higher-priority insurer, pursuant to MCL 500.3114(5)(c). However, the parties ultimately stipulated to AAA's dismissal, and AAA is not a party to this appeal.

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle *which he or she had taken unlawfully*, unless the person reasonably believed that he or she was entitled to take and use the vehicle. [Emphasis added.]

The applicability of this statute involves two inquiries. "[T]he first level of inquiry will always be whether the taking of the vehicle was unlawful." *Amerisure Ins Co v Plumb*, 282 Mich App 417, 425; 766 NW2d 878 (2009). This inquiry "necessarily entail[s] ascertaining whether the injured individual seeking coverage took the vehicle or engaged in the taking of the vehicle." *Henry Ford Health Sys v Esurance Ins Co*, 288 Mich App 593, 599; 808 NW2d 1 (2010).[3] "If the taking was lawful, the inquiry ends because § 3113(a) does not apply." *Plumb*, 282 Mich App at 425. However, if the injured individual unlawfully took the vehicle, the next step, under the "saving clause" of the statute, is to determine if that person "reasonably believed that he or she was entitled to take and use the vehicle." MCL 500.3113(a). See also *Plumb*, 282 Mich App at 427.

In this case, the first level of inquiry involves whether a claimant who had taken possession of a vehicle with the mistaken belief that the owner had given consent (when in fact the person who had given consent was not the owner and was not authorized to give consent) "had taken" the vehicle "unlawfully," within the meaning of MCL 500.3113(a). Our consideration of that question leaves us with the definite and

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[3] In *Esurance*, the injured person was a passenger in the vehicle, and there was no evidence from which to conclude that *he* " 'had taken' the vehicle, let alone that he took it unlawfully." *Esurance*, 288 Mich App at 600-601.

firm conviction that the state of the law in this area has been hopelessly muddled and is in desperate need of clarity. It further, and once again, highlights for us the confusion and uncertainty that is created in the law when (a) legislatures craft statutory language without adequate specificity and definition, and (b) courts then create "judicial exceptions" to statutory schemes in order to fill in the blanks that were left by the legislature in drafting the statutory language that the courts are supposed to apply.

Our Supreme Court recently provided some clarity in this area in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012). We endeavor herein to address and apply the statutory text to the facts before us, and also to appropriately apply the relevant caselaw, including the Supreme Court's recent decision in *Spectrum Health*, and thus to provide additional clarity in the context of the instant appeal.

A. STATUTORY CONSTRUCTION

As always, our statutory analysis begins with the language of the statute at issue. *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009). As noted earlier in this opinion, MCL 500.3113(a) excludes a person from the otherwise applicable entitlement to personal protection insurance benefits for accidental bodily injury ("PIP benefits") if (a) "[t]he person was using a motor vehicle or motorcycle," (b) "which he or she had taken unlawfully," (c) "unless the person reasonably believed that he or she was entitled to take and use the vehicle."

There is no question here that plaintiff "was using a . . . motorcycle." *Id*. Therefore, the first condition is satisfied.

Less clear is whether the motorcycle was one "which [plaintiff] had taken unlawfully." *Id*. Unfortunately, the Legislature did not provide any definition of what "taken unlawfully" means, particularly in a context such as this. Given the lack of statutory definition, the courts have struggled ever since to provide the requisite definition in the various factual contexts in which the question has arisen.

Finally, and assuming that there was an unlawful taking, the question arises, under the "saving clause" of the statute, whether plaintiff had a reasonable belief that he was "entitled to take and use the vehicle." *Id*. Again, given the lack of legislative definition, the courts have grappled with the meaning of "entitled to take and use," and particularly whether, in the current context, "entitled to . . . use" relates to authorization from the vehicle's owner (or perhaps another person) or additionally encompasses entitlement from the state (e.g., in terms of licensure or insurance). *Id*.

B. UNLAWFUL TAKING

By our reading of the statute, for a claimant to have "taken [a vehicle] unlawfully," (a) a vehicle must have been "taken," (b) the taking of the vehicle must have been "unlawful[]," (c) it must have been the injured claimant who took the vehicle unlawfully (by virtue of the statutory prefacing of the words "had taken unlawfully" with the identifier "he or she"), and (d) the injured person must therefore have both "taken" the vehicle and acted somehow "unlawfully" in doing so. *Id*.

Because "taken unlawfully" is legislatively undefined under the no-fault act, the courts have been left to discern whether the term means a taking that is (a) in violation of a criminal statute (and, if so, which ones), (b) without authorization of law, (c) without authoriza-

tion of any person, (d) without authorization of the vehicle's owner, or (e) something else. Our Supreme Court in *Spectrum Health*, 492 Mich at 509, has now provided some guidance in that respect, holding that "any person who takes a vehicle contrary to a provision of the Michigan Penal Code [MCL 750.1 *et seq*.] . . . has taken the vehicle unlawfully for purposes of MCL 500.3113(a)." The Court further found that "in this context, the term 'unlawful' can only refer to the Michigan Penal Code," *id*. at 517 n 22, and rejected the reasoning of prior caselaw that "did not address whether the end user of a vehicle violated the Michigan Penal Code", *id*. at 510.[4]

In our view, taking into appropriate consideration the statutory language and the caselaw, including *Spectrum Health*, the term "taken unlawfully" as used in MCL 500.3113(a) thus requires some action by the "end user" of the vehicle that is contrary to the Michigan Penal Code. At the same time, we cannot agree with plaintiff's pre-*Spectrum Health* characterization that "Michigan courts have repeatedly and correctly concluded that determination of an unlawful taking under MCL 500.3113 rest [sic] on whether possession violated criminal statutes such as MCL 750.413 [taking possession of and driving away a motor vehicle] or MCL 750.414 [unauthorized taking or use of a motor vehicle without intent to steal]." Not only does the statutory

[4] As the Supreme Court noted in *Spectrum Health*,

> [t]he word 'unlawful' commonly means 'not lawful; contrary to law; illegal,' and the word "take" is commonly understood as 'to get into one's hands or possession by voluntary action.' When the words are considered together, the plain meaning of the phrase 'taken unlawfully' readily embraces a situation in which an individual gains possession of a vehicle contrary to Michigan law. [*Spectrum Health*, 492 Mich at 516-517 (citations omitted).]

text not expressly say that, but neither in our view did the caselaw, at least until the Supreme Court's recent opinion in *Spectrum Health*.[5]

While we, therefore, are unable to conclude that the pre-*Spectrum Health* caselaw supports plaintiff's interpretation, the Supreme Court in *Spectrum Health* held—consistently with plaintiff's position—that an unlawful taking under MCL 500.3113(a) requires action by the "end user" that is "contrary to a provision of the Michigan Penal Code . . . ." *Spectrum Health*, 492 Mich at 509-510.

For the reasons that follow, we conclude that plaintiff did not take the motorcycle unlawfully under MCL 500.3113(a). Further, having reached that conclusion, we need not address the applicability of the saving clause of the statute or decide, under its second prong of analysis, whether plaintiff reasonably believed that he was entitled to take and use the vehicle. Accordingly, we reverse the trial court's finding of an unlawful taking under MCL 500.3113(a) and remand for further proceedings.

Recognizing that the Supreme Court in *Spectrum Health* has now addressed the issue, it remains helpful to consider that decision, and plaintiff's arguments, in the context of the preexisting case law. Because the caselaw gives context to our analysis, and because plaintiff argues that the caselaw requires an interpretation different from ours, we examine the development of the caselaw up to and including *Spectrum Health*. We believe that discussion further confirms our conclusion that the statutory scheme has long cried out for, and to some extent still requires, clarification.

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[5] In fact, the Supreme Court in *Spectrum Health* expressly overruled (at least in part) many of the cases on which plaintiff purports to rely. *Spectrum Health*, 492 Mich at 510-511, 537-538.

With little analysis (albeit without the benefit of *Spectrum Health* having been decided when his brief was written), plaintiff cites (a) the nonmajority lead opinion and the dissent in *Priesman v Meridian Mut Ins Co*, 441 Mich 60; 490 NW2d 314 (1992), overruled by *Spectrum Health*, 492 Mich at 511; (b) a concurring opinion in *Allen v State Farm Mut Auto Ins Co*, 268 Mich App 342; 708 NW2d 131 (2005), overruled by *Spectrum Health*, 492 Mich at 511; (c) *Landon v Titan Ins Co*, 251 Mich App 633; 651 NW2d 93 (2002); (d) *Mester v State Farm Mut Ins Co*, 235 Mich App 84; 596 NW2d 205 (1999), overruled by *Spectrum Health*, 492 Mich at 511; and (e) *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244; 570 NW2d 304 (1997), overruled by *Spectrum Health*, 492 Mich at 511.[6] On the basis of the supposed clarity of those decisions, plaintiff argues that he did not violate MCL 750.413 or 750.414 and that, therefore, he did not take the motorcycle unlawfully under MCL 500.3113(a). Plaintiff further concludes, as a result, that *Plumb* (on which the trial court relied in granting summary disposition to defendants) wrongly concluded that a person unlawfully takes a vehicle unless he or she had an "unbroken chain of permission traceable to the owner" (language that appears nowhere in *Plumb*). Plaintiff therefore argues that *Plumb* was wrongly decided and that, under MCR 7.215(J), we should reject it in favor of supposedly

[6] Apparently mistakenly, plaintiff also cites "*Roberts ex rel Irwin v Titan Ins Co*, 485 Mich 905, 907 (2009) (CORRIGAN, J., dissenting)." However the case that appears on the cited page is *Riley v State Farm Fire & Cas Co*, 485 Mich 905 (2009), in which Justice CORRIGAN issued a dissenting statement regarding an order denying leave to appeal on a matter that is not pertinent to this one. We assume that plaintiff intended to cite *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339; 764 NW2d 304 (2009), overruled by *Spectrum Health*, 492 Mich at 511 (discussed later in this opinion).

contrary controlling precedent issued before *Plumb*, but after November 1, 1990.[7]

We note that the Supreme Court in *Spectrum Health* did not (at least explicitly) overrule *Plumb* in any respect, and in fact favorably cited it (albeit on a point of law other than "unlawful taking"). *Spectrum Health*, 492 Mich at 518 n 25. But we also find *Plumb* to be distinguishable and not controlling here, particularly in light of *Spectrum Health*, and therefore decline plaintiff's invitation to reject *Plumb* as wrongly decided.

Plaintiff first relies on a nonmajority (three-justice) lead opinion of our Supreme Court in *Priesman*, in which, faced with a lack of clear legislative definition, a plurality of justices took it upon themselves to judicially read into MCL 500.3113(a) an exception for joyriding family members, even though joyriding indisputably is an unlawful activity.[8] This plurality opinion, while not binding precedent, thus suggested that a denial of PIP benefits resulting from the application of MCL 500.3113(a) was limited to situations of "thieves while driving stolen vehicles . . . ." *Priesman*, 441 Mich at 67 (opinion by LEVIN, J.). A three-justice dissent (authored by Justice GRIFFIN) in *Priesman* argued, to the contrary, that application of the MCL 500.3113(a) exclusion was not limited to "car thieves," and extended even to

[7] Regardless of its genesis or past application, the Supreme Court has now rejected the "chain of permissive use" theory. *Spectrum Health*, 492 Mich at 509-510.

[8] To add to the confusion, the lead opinion in *Priesman* did not identify the statutory provision prohibiting "joyriding." The *Priesman* dissent identified it as MCL 750.414. *Priesman*, 441 Mich at 69-70. This Court in *Mester*, 235 Mich App at 88, identified it not as MCL 750.414, but rather as MCL 750.413. In his brief on appeal in this case, plaintiff variously describes it both ways. A concurring opinion in *Allen*, 268 Mich App at 351 (KELLY, J., concurring), states that both MCL 750.413 and MCL 750.414 are "generically referred to as 'joyriding' offenses.' "

family members engaged in joyriding. *Id*. at 69-76 (GRIFFIN, J., dissenting). Neither the lead opinion nor the dissent in *Priesman* stated, however, as plaintiff in the instant case suggests, that the "taken unlawfully" requirement of MCL 500.3113(a) requires a violation specifically of MCL 750.413 or MCL 750.414, or whether there might be some other basis for finding an unlawful taking.[9]

Thereafter, this Court in *Bronson Methodist Hosp v Forshee*, 198 Mich App 617; 499 NW2d 423 (1993), overruled by *Spectrum Health*, 492 Mich at 510, found that there was no "unlawful taking" when the injured person had used the vehicle with the permission of his friend, who in turn had used it with the permission of his friend, who in turn had used it with the permission of his father, the vehicle's owner. Given the dearth of caselaw on what constitutes an "unlawful taking" in this no-fault context, the Court found "guidance in the decisions that have construed whether a vehicle was taken with consent for purposes of the owner's liability statute, MCL 257.401; MSA 9.2101," *id*. at 623, and concluded that "the broad definition of "consent" employed by the Supreme Court in the owner liability context is of equal applicability here," *id*. at 624. The Court thus concluded that

> an owner who willingly surrenders control of his vehicle to others consents to the assumption of the risks attendant upon his surrender of control. That is, the person to whom the vehicle is entrusted may thereafter violate the instructions of the owner, such as loaning the vehicle to another person. More to the point . . . when an owner loans his vehicle to another, it is foreseeable that the borrower may thereafter lend the vehicle to a third party and such further

[9] The lead opinion and the dissent in *Priesman* agreed that "unlawfulness" does not depend on "*conviction* of a crime." *Priesman*, 441 Mich at 63 n 5 (opinion by LEVIN, J.) (emphasis added); *id*., at 72 (GRIFFIN, J., dissenting).

> borrowing of the vehicle by the third party is, by implication, with the consent of the owner. [*Id.* at 624-625.[10]]

Because there was an "unbroken chain of permissive use," the Court in *Bronson* found that the injured person had not "taken [the vehicle] unlawfully" under MCL 500.3113(a):

> Thus, returning to the case at bar, under the reasoning of [a leading Supreme Court decision concerning the owner's liability statute], Mark Forshee's use of the vehicle at the time of the accident was with the owner's consent inasmuch as the owner, Stanley Pefley, entrusted the vehicle to his son, Thomas, who in turn entrusted the vehicle to Morrow, who finally entrusted it to Forshee. Given this unbroken chain of permissive use, we cannot say that Forshee's taking of the automobile was unlawful. . . . [T]he mere fact that the borrower violates the restrictions placed on him by the owner does not negate the fact that the subsequent taking by a third party is, by implication, with the owner's consent. Therefore, even though Stanley Pefley had placed restrictions on the use of the vehicle he entrusted to his son, including the specific restriction that Mark Forshee was not to use the vehicle, the fact that the vehicle was ultimately entrusted to Forshee in violation of those restrictions does not change the fact that the taking and use was with the owner's consent . . . . [*Id.* at 625.]

The "unbroken chain of permissive use" language thus emanated not from *Plumb*, as plaintiff suggests, but instead from *Bronson*.[11] Notably in our view, how-

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[10] The Court in *Bronson* relied in part on the prior decision in *State Farm Mut Auto Ins Co v Hawkeye-Security Ins Co*, 115 Mich App 675; 321 NW2d 769 (1982). In that case, the Court found that an employee's personal use of his employer's vehicle after working hours did not fall within the MCL 500.3113(a) exclusion—even though that use was unauthorized by the vehicle's owner—because "the original taking . . . was not unlawful . . . ." *Id.* at 682.

[11] Perhaps in recognition of this, plaintiff argues that *Bronson* "never departed from *Priesman's* unanimous recognition that MCL 750.413 and

ever, the Court in *Bronson* did not say that *absent* an "unbroken chain of permissive use," there necessarily would *be* an "unlawful taking." In other words, the existence of an "unbroken chain of permissive use" was *sufficient*, according to *Bronson*, to conclude that there was no "unlawful taking." But the existence of an unbroken chain of permissive use was not required in order for there to have been no unlawful taking.[12]

Thereafter, in *Butterworth*, this Court adopted the *Priesman* "family member joyriding exception," in finding that a minor who took his mother's vehicle without her permission did not fall within MCL 500.3113(a). Although the Court in *Butterworth* recognized that the lead opinion in *Priesman* was nonbinding and even noted that "any joyriding exception seems to be in derogation of the clear language of the statutes," *Butterworth*, 225 Mich App at 249 n 2, it nonetheless felt "compelled" to follow it because a majority of the Supreme Court in *Priesman* had affirmed this Court's determination, "allowing coverage for a joyriding family member," *Butterworth*, 225 Mich App at 248-249.[13] In

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MCL 750.414 govern determination of unlawful taking under MCL 500.3113(a)." But while it may be true that the Court in *Bronson* "never departed" from *Priesman*, it is also true that this Court's holding in *Bronson* did not rely on *Priesman* at all.

[12] Our Supreme Court has in any event now rejected "the *Bronson* Court's 'chain of permissive use' theory [as] inconsistent with the statutory language of the no-fault act," and as "not faithfully apply[ing] the standard articulated in MCL 500.3113(a) to determine whether the claimant 'had taken [the vehicle] unlawfully.' " *Spectrum Health*, 492 Mich at 521, 523 (third alteration in original). Instead, the Court found that because the claimant had violated MCL 750.414 (one of the joyriding statutes), "MCL 500.3113(a) precludes PIP benefits in this case." *Id.* at 524.

[13] We note that the Court of Appeals' decision in *Priesman* was decided, with limited analysis, on May 29, 1990, and released for publication on August 2, 1990. *Priesman v Meridian Mut Ins Co*, 185 Mich App 123; 460 NW2d 244 (1990). Therefore, it is not binding under MCR 7.215(J)(1)

adopting the "family member joyriding exception," the Court in *Butterworth* contrasted "joyriding" (which occurs "without the intent to steal") with "attempting to steal," *id.* at 249, and suggested that only a taking of a vehicle with "intent to steal" fell within MCL 500.3113(a) (at least if carried out by a family member).

Subsequently, in *Mester*, this Court declined to extend the joyriding exception created in *Priesman* and *Butterworth* to injured parties other than family members.[14] The Court specifically stated that "[a]n unlawful taking does not require an intent to permanently deprive the owner of the vehicle to constitute an offense," and that in drafting MCL 500.3113(a), "the Legislature chose a term that encompasses the offense of joyriding," *Mester*, 235 Mich App at 88. Noting that *Priesman* and *Butterworth* had created a " 'family member' joyriding exception," *id.* at 87, the Court declined to extend that exception to unrelated individuals.

In 2002, this Court in *Landon* found that *Butterworth* and *Mester* were inconsistent, and that they conflicted on the issue whether a violation of MCL 750.413 fell within the MCL 500.3113(a) exclusion:

> This Court has issued two decisions concerning whether a violation of MCL 750.413 qualifies as an "unlawful" taking and therefore allows application of the PIP benefits exclusion contained in MCL 500.3113(a). However, those

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(which requires a panel of the Court of Appeals to follow the rule of law established by a prior published decision of this Court "issued on or after November 1, 1990") or its predecessor, Administrative Order No. 1990-6 (which was also effective on November 1, 1990), 436 Mich lxxxiv.

[14] A concurring opinion in *Butterworth* earlier had advocated for broadly reading the *Priesman* joyriding exception to include "*anyone* who is merely joyriding." *Butterworth*, 225 Mich App at 253 (HOEKSTRA, J., concurring). The concurrence also suggested that the MCL 500.3113(a) exclusion should "preclude[] coverage only where the person taking the vehicle unlawfully does so with the *intent to steal* . . . ." *Id.* (emphasis added).

> decisions conflict. The *Mester* Court held that a violation of MCL 750.413 precludes an injured person from recovering PIP benefits under subsection 3113(a). *Mester*, *supra* at 88. In contrast, the *Butterworth* Court held that a violation of MCL 750.413 does not preclude an injured person from recovering PIP benefits under subsection 3113(a). *Butterworth*, *supra* at 249-250. The conflict between these two decisions appears to be premised on whether the "taken unlawfully" language of subsection 3113(a) applies only in situations where the injured person has "stolen" the vehicle in which the person was injured. Further, the conflict appears to arise from our Supreme Court's fractured opinion in *Priesman v Meridian Mut Ins Co*, 441 Mich 60; 490 NW2d 314 (1992). [*Landon*, 251 Mich App at 640.]

Ultimately, the Court in *Landon* determined that it did not need to resolve this conflict because it found, under the facts before it,[15] that the injured party was a "bailee" of the vehicle who possessed the vehicle with the owner's consent and who arguably had the implied (although not express) consent of the owner to use the vehicle and, therefore, did not violate MCL 750.413, did not take the vehicle unlawfully under the MCL 500.3113(a) exclusion and, accordingly, was entitled to PIP benefits.[16] *Id*. at 641, 650.

In 2005, this Court decided *Allen*, which presented the issue whether a live-in companion was a family member for purposes of the *Priesman*/*Butterworth*

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[15] The owner of the vehicle had received permission from the injured person to park the car in her yard for purposes of attempting to sell the vehicle. The owner left the keys in the unlocked car so that potential purchasers could test-drive the vehicle. The injured person later used the vehicle herself and was injured in an accident. *Landon*, 251 Mich App at 635-636.

[16] In distinguishing between MCL 750.413 and MCL 750.414, the Court in *Landon* noted that MCL 750.413 is a felony provision, while MCL 750.414 is a misdemeanor provision. The Court found that "a violation of MCL 750.414 does not call for application of the benefits exclusion contained in subsection 3113(a) . . . ." *Id.* at 650.

"family member joyriding exception." A majority of this Court concluded that the exception did not apply, refusing to extend the exception to the facts of that case. *Allen*, 268 Mich App at 348. A concurring opinion expressly disagreed with the reasoning of *Butterworth* and with its "application of MCL 500.3113(a) only to car thefts," and endorsed the reasoning of Justice GRIFFIN's dissent in *Priesman*. *Id.* at 349-350 (KELLY, J., concurring).

In *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339; 764 NW2d 304 (2009), this Court once again had occasion to consider the exception created in *Priesman* and *Butterworth* for joyriding family members, considering the exception in connection with an injury to a minor who was driving, without permission, a motor vehicle that was owned by an unrelated person who lived with the minor and his mother. The owner had given possession of the vehicle to the minor's mother for her to use. *Id*. at 342-343. The trial court granted summary disposition to the insurer on the grounds that the minor had unlawfully taken the vehicle and that the *Priesman* joyriding exception did not apply. *Id*. at 347-348.

This Court reversed, and perhaps because of a presumption that the minor's mother "owned" the vehicle, *id*. at 354-356, did not rely on the opinions in *Mester* and *Allen*, which refused to extend the joyriding exception (created in *Priesman* and *Butterworth* to unrelated individuals. Instead, the Court in *Roberts* found the joyriding exception to be applicable, noting that *Butterworth* had found that "MCL 500.3113(a) did not apply to any person who takes a family member's vehicle for joyriding purposes; rather, the statute only operated to exclude a person from coverage if he or she had an actual intent to steal the vehicle." *Id.* at 351-352. But, expressing its disagreement with *Butterworth* and the

lead opinion in *Priesman*, the Court stated, "were we not so bound to follow the *Butterworth* decision, we would instead follow Justice GRIFFIN's dissent in *Priesman*, in which he concluded that, by creating the joyriding exception, the lead opinion improperly 'depart[ed] from the clear and unambiguous language of § 3113(a) . . . .' " *Id.* at 353-354 (citation omitted; alteration in original).[17]

In the context of this preexisting caselaw, the Supreme Court in *Spectrum Health* recently considered anew the "family member joyriding exception," as well as *Bronson's* "chain of permissive use" theory. In a decision that it described as "retrospective in its operation," the Court disavowed the plurality opinion in *Priesman*, "overrule[d] its Court of Appeals progeny as inconsistent with MCL 500.3113(a)," and overruled *Bronson*'s application of the "chain of permissive use" theory. *Spectrum Health*, 492 Mich at 510, 536-538.[18]

While it is undisputed that the instant case does not present an issue of joyriding by a family member under the now disavowed exception created in *Priesman* and *Butterworth*, our examination of this caselaw adds to the overall context of the issues before us and aids in understanding the underpinnings of the legislative and judicial morass that has preceded our consideration of this appeal.

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[17] In its original opinion of December 4, 2008, this Court in *Roberts v Titan Ins Co*, 281 Mich App 551, 574 (2008), declared a conflict with *Butterworth*, following which the judges of this Court were polled pursuant to court rule, and an order subsequently issued directing that a special conflict panel would not be convened pursuant to MCR 7.215(J). *Roberts v Titan Ins Co*, 281 Mich App 801 (2008). To the extent that such a conflict existed, *Butterworth* therefore remained controlling. MCR 7.215(J)(1).

[18] The Supreme Court expressly overruled *Butterworth*, *Mester*, *Allen*, and *Roberts* because "the family-joyriding exception has no basis in the language of MCL 500.3113(a) . . . ." *Spectrum Health*, 492 Mich at 511.

That brings us to *Plumb*, which plaintiff contends was wrongly decided and should not be followed. In *Plumb*, the injured person, Rae Plumb, who had been drinking for several hours at a bar, left the bar with two men, one of whom apparently gave her the keys to a vehicle and asked her to drive him. The man who gave her the keys turned out not to be the owner of the vehicle. Another man, David Shelton, testified that he had an agreement to buy the vehicle and had been using it for more than 30 days (and thus was considered an "owner" for purposes of the no-fault automobile insurance act), that he had left the keys in the vehicle when he parked it in the bar parking lot, and that he did not give the keys, or permission to drive the vehicle, to anyone. *Plumb*, 282 Mich App at 420-421.

Given Plumb's apparent level of intoxication, the trial court initially concluded that she had presented mere speculation and conjecture with respect to how she had received permission to drive the vehicle. On reconsideration, the trial court found that it did not matter, and that even assuming that she had permission, she was not entitled to drive the vehicle because she lacked a driver's license and was intoxicated. The trial court granted summary disposition in favor of the defendant, finding that the MCL 500.3113(a) exclusion applied. *Id*. at 422-423.

On appeal, this Court briefly addressed the "unlawful taking" requirement of MCL 500.3113(a), but, primarily focusing on the saving clause, affirmed the trial court's finding "because there is no genuine issue of material fact that Plumb did not have a reasonable belief that she was entitled to 'use' the Jeep, within the meaning of § 3113(a)." *Id.* at 423.

With respect to the "unlawful taking" requirement, this Court merely stated as follows:

> Although Plumb asserted that she received the keys from the unidentified man, there is no evidence that she received them from Shelton or the titled owner or otherwise had permission to take the Jeep and, accordingly, there is no material question of fact that Plumb lacked Shelton's consent or implied consent to take the Jeep. Nor is there any evidence to suggest that Plumb had an intent to permanently deprive Shelton of the Jeep, and thus her conduct could be considered joyriding. However, given that Plumb and Shelton are not family members, the joyriding exception is unavailable. Therefore, there is no genuine issue of material fact that Plumb unlawfully took the Jeep, and § 3113(a) applies. [*Id.* at 426-427 (citations omitted).]

The majority opinion in *Plumb* thus acknowledged the then existing *Priesman*/*Butterworth* "family member joyriding exception," noted that *Butterworth* had held that the MCL 500.3113(a) exclusion required an "actual intent to steal the vehicle" and an "intent to permanently deprive" the owner of the vehicle, but found the joyriding exception to be inapplicable because the injured person was not a family member of the owner. *Id*.

The Court provided no further analysis of when an "unlawful taking" occurs outside the context of the joyriding exception. The Court merely noted a lack of any evidence that the injured person had the "permission" of the owner to take the vehicle and concluded that "[t]herefore, . . . *Plumb* unlawfully took" the vehicle. *Id.* at 427. On its face, this might suggest that nothing further is required. However, we believe that the *Plumb* Court's analysis on this point was colored by two critical factors: (a) Plumb was intoxicated to such a level that it could not be determined whether she had reason to know that the taking of the vehicle was "unlawful" or without proper authority, and (b) she apparently left the bar, in that intoxicated condition,

with two men, one of whom was in possession of the car keys and with whom she *jointly* then "took" the vehicle.

It is not surprising, given those circumstances, that the Court in *Plumb* rather cursorily concluded that there had been an "unlawful taking," and instead focused on, and premised its affirmance on, the saving clause and Plumb's lack of a "reasonable belief" that she was "entitled to take and use the vehicle."

In this case, by contrast, the record evidence indicates that plaintiff had every reason to believe that he had obtained the motorcycle from its rightful owner, and there were no countervailing considerations (such as intoxication or joint conduct with the person who actually took the motorcycle from its rightful owner). We therefore find *Plumb* to be distinguishable rather than wrongly decided with regard to this first prong of the analysis—the issue of an "unlawful taking."

Plaintiff also contends that the court in *ACIA v Great American Ins Group*, 800 F Supp 2d 877, 883 (ED Mich, 2011), erred in applying *Plumb* and by "misreading" *Bronson*, to find an "unlawful taking" under MCL 500.3113(a) where, as here, a motorcycle operator was injured (in that case while taking the motorcycle on a test drive). We agree. While *ACIA* represents a fact pattern similar to that of the instant case, it is not binding on us and, for the reasons noted, it failed to correctly apply *Plumb* and the now overruled *Bronson*. Moreover, the court in *ACIA* appeared to recognize the fallacy of applying the caselaw as it did, reaching its conclusion only because the "Michigan caselaw . . . *seemingly compels the conclusion* that [the injured person] unlawfully took the motorcycle he was riding at the time he sustained his injuries." *Id.* (emphasis added). We believe that it does not, and we believe that our conclusion is buttressed by the Supreme Court's recent decision in *Spectrum Health*, as discussed herein.

Plaintiff further argues that *Plumb* "spawned" another "anomalous" unpublished decision of this Court in which we found an "unlawful taking" in the absence of an unbroken chain of permissive use. See *Farmers Ins Exch v Young*, unpublished opinion per curiam of the Court of Appeals, issued August 3, 2010 (Docket Nos. 275584 and 283865). The Supreme Court denied leave to appeal this Court's determination in that case. *Farmers Ins Exch v Young*, 489 Mich 909 (2011).[19] However, we again find *Young* distinguishable because there was a plethora of evidence in that case that demonstrated that the injured person actually knew and had reason to know that he in fact was not authorized to take the vehicle. Moreover, we did not, as plaintiff asserts, conclude that a taking is necessarily "unlawful *if* consent could not be implied through a chain of entrustment from the owner to the injured person." (Emphasis added; quotation marks and citation omitted.) To the contrary, we did not preclude a finding that a taking could be lawful even absent a "chain of entrustment."

Of note too is Justice MARILYN KELLY's dissent from the denial of the application for leave to appeal in *Young*:

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[19] Interestingly, Justice MARKMAN indicated in a concurring statement that he would "refine the holding" of *Plumb*. *Young*, 489 Mich at 909 (MARKMAN, J., concurring). Citing *Mester* for the proposition that an "unlawful taking does not require an intent to permanently deprive the owner of the vehicle," Justice MARKMAN indicated instead that an unlawful taking "may occur where a person has taken a vehicle 'without authority.' " *Id.* (citation and quotation marks omitted) (Justice MARKMAN further stated that the "authority" in question was that of the "owner" and did not include that of the state, such that lack of proper insurance or licensure should not enter into the "unlawful taking" analysis). Citing to MCL 750.413 and MCL 750.414 for the proposition that an unlawful taking may occur when the taking of the vehicle is "without authority," Justice MARKMAN presaged the outcome in *Spectrum Health*, which cited with approval Justice MARKMAN's concurrence in *Young*, and which included those statutory joyriding proscriptions of the Michigan Penal Code within the "unlawful taking" component of MCL 500.3113(a). *Spectrum Health*, 492 Mich at 517-518.

> The question whether an individual violated a statute in taking a vehicle must be viewed from the perspective of the person taking the vehicle. This approach is mandated because statutes pertaining to the unlawful taking of a vehicle, such as MCL 750.413 or MCL 750.414, contain an element of intent.
>
> In the case at hand, defendant Young neither had the intent to steal nor to joyride when he drove Lee back to her cousin's home. When Lee showed up at his place of work in the vehicle with its owner's son in tow, she appeared to have the authority to drive the vehicle. [*Id.* at 912 (MARILYN KELLY, J., dissenting).]

While we would not necessarily endorse the conclusions of that dissent in the case in which it arose, we do believe that it appropriately recognized that, in construing the language of MCL 500.3113(a) that "he or she had taken [a vehicle] unlawfully," there must be some focus on the *conduct* of the *injured person* (i.e., the "he or she" in question), some characteristic of unlawfulness about that conduct, and some element of intent on the part of the actor. For the reasons noted, we believe this to be consistent with the text of the statute itself and, muddled though it has been, with the caselaw as well.

We further believe that our interpretation is consistent with the Supreme Court's recent pronouncements in *Spectrum Health*. In rejecting *Bronson*'s "chain of permissive use" theory, the Court found that *Bronson* improperly looked to the owner's liability statute, MCL 257.401, for guidance in interpreting MCL 500.3113(a), and thus improperly focused on "*an owner's* 'express or implied consent or knowledge,' " *Spectrum Health*, 492 Mich at 522. *Bronson* failed to recognize that MCL 500.3113(a) "examines the legality of the taking from the *driver's* perspective—a perspective that the owner's liability statute lacks." *Id*.

Spectrum Health thus clarifies that MCL 500.3113(a) requires us to "examine[] the legality of the taking from the *driver's* perspective," and further requires that the "end user" driver has taken the vehicle "contrary to a provision of the Michigan Penal Code." *Id.* at 510, 522. In this case, there is no dispute that plaintiff did not take the vehicle in violation of the Michigan Penal Code, and that, viewed from plaintiff's (the driver's) perspective, there was no "unlawful taking."[20]

Applying the text of the statute and the caselaw discussed in this opinion, we therefore conclude, on the basis of the record evidence, that there is no genuine issue of material fact that plaintiff did not take the motorcycle unlawfully under MCL 500.3113(a), and that the first prong of the statutory analysis is not satisfied. Simply put, plaintiff was not the person who took the vehicle unlawfully. He was a person who, with no unlawful intent and with no knowledge of any unlawful taking, used a vehicle that another person may have taken unlawfully. Accordingly, we reverse the trial court's award of summary disposition in favor of

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[20] We note that the Supreme Court in *Spectrum Health* rejected the opinion of the dissent in that case that the majority's interpretation of MCL 500.3113(a) (as inclusive of unlawful takings by "anyone") " 'precludes a class of injured parties from recovering PIP benefits even when a party was given permission to take a car by an intermediate user.' " *Id.* at 518 n 26, quoting *id.* at 552 (HATHAWAY, J., dissenting). On the facts before it, the Court based its disagreement with the dissent on the existence of the saving clause of MCL 500.3113(a) (the second prong of analysis, discussed in part II(C) of this opinion). *Spectrum Health*, 492 Mich at 518 n 26. However, we do not read *Spectrum Health* as precluding a finding, in appropriate circumstances, that an "end user" who was given permission by an "intermediate user" also did not take a vehicle unlawfully under the first prong of analysis under MCL 500.3113(a). Our conclusion finds support in the Supreme Court's requirement that, under MCL 500.3113(a), an end user have violated the Michigan Penal Code in order to have "unlawfully taken" a vehicle. *Id.*at 510, 516-517. Where, as here, the end user did not violate the Michigan Penal Code, there is no "unlawful taking" within the meaning of MCL 500.3113(a).

defendants, and remand for further proceedings.

C. REASONABLE BELIEF OF ENTITLEMENT TO TAKE AND USE VEHICLE

Given our conclusion that plaintiff did not take the vehicle unlawfully, we need not reach the second phase of analysis, under the saving clause of MCL 500.3113(a). Under that clause, even if an injured person had "taken [a vehicle] unlawfully", MCL 500.3113(a) does not apply if "the person reasonably believed that he or she was entitled to take and use the vehicle." *Id*. See also *Plumb*, 282 Mich App at 429. We therefore do not decide that question here and write further only to more expansively demonstrate how the uncertain state of the law would benefit from a further injection of clarity with respect to this second prong of analysis.

In construing the saving clause, this Court in *Plumb* distinguished between entitlement to "take" a vehicle and entitlement to "use" it. The Court stated, "[i]f Plumb received the keys from someone who appeared to own the Jeep, it would have been reasonable for her to believe that she was entitled to take the Jeep within the meaning of [the saving clause of] § 3113(a)." *Plumb*, 282 Mich App at 430. The Court thus found that there was a genuine issue of material fact concerning whether Plumb reasonably believed that she was entitled to *take* the vehicle. *Id*. at 430-431. However, the Court further found that because Plumb drove the vehicle while she was intoxicated (and because she additionally knew that her driver's license had been suspended), Plumb "could not have reasonably believed that she was entitled to *use* [the vehicle]." *Id*. at 431-432 (emphasis added).[21]

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[21] Were we to reach the "saving clause" analysis in this case, we might be obliged to apply *Plumb* to reach a similar conclusion here because

Plaintiff argues that *Plumb* "disregarded established post-1990 published law that a suspended license does not exempt operation of the 'reasonable belief to use' exception," citing *Bronson* and *Butterworth*.[22] The Court in *Plumb* found, however, that *Bronson*'s discussion (in its "saving clause" analysis) of the ramifications of a claimant's lack of a driver's license was dictum because the Court's holding rested on there having been no unlawful taking at all (such that the "saving clause" analysis was superfluous). *Plumb*, 282 Mich App at 427 n 4, citing *Bronson*, 198 Mich App at 625-627. See also *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 436-437; 751 NW2d 8 (2008) (defining obiter dictum to include "a judicial opinion in a matter related but not essential to a case") (citation and quotation marks omitted). Cf. *Boodt v Borgess Med Ctr*, 481 Mich 558, 563 n 4; 751 NW2d 44 (2008) (indicating that a discussion that is not essential to the case does not create a rule of law).

The Court in *Plumb* therefore arguably read into the "entitled to . . . use" language of the saving clause a requirement that the person be able to "legally operate the vehicle" under the motor vehicle laws. *Plumb*, 282 Mich App at 431-432. See also *id*. at 433 (O'CONNELL, J., dissenting). Justice MARKMAN has since opined that "[w]hether the use was 'legal' will often be a highly relevant factor in making this determination" under the saving clause (but not under the initial "unlawful taking" analysis). *Young*, 489 Mich at 909 (MARKMAN, J.,

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plaintiff used the motorcycle knowing that his Tennessee driver's license had been suspended and that he had not obtained a valid Michigan driver's license.

[22] If *Plumb* conflicts with either of those decisions, this Court is obligated to follow the first opinion issued. See *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 473; 556 NW2d 517 (1996) ("When a panel is confronted with two conflicting opinions published after November 1, 1990, the panel is obligated to follow the first opinion issued.").

concurring in the order denying the application for leave to appeal). Justice MARILYN KELLY finds it relevant to neither analysis. *Id.* at 913 (MARILYN KELLY, J., dissenting) ("Notwithstanding the fact that Young did not have a valid driver's license, under the facts of this case, his belief that he was entitled to take and use the vehicle was reasonable.").

In *Butterworth*, this Court addressed the insurer's argument that the claimant "took the vehicle unlawfully because he took it knowing that he . . . was not entitled to be a licensed driver." *Butterworth*, 225 Mich App at 250. In rejecting that argument, the Court therefore addressed (in a conclusion that appears now to have been called into question by at least two of our current Supreme Court justices as noted earlier in this opinion), the licensure issue in the context of the "unlawful taking" prong of analysis. It did not, however, examine it under the second level of inquiry, i.e., the saving clause. *Butterworth* therefore did not establish a rule of law on that point.

What does all of this mean? It again means that the law, not only as to the "unlawful taking" analysis, but additionally with regard to the saving clause of MCL 500.3113(a), has been (and to some extent remains) seriously muddled and in need of clarification. With respect to the saving clause of MCL 500.3113(a), any analysis will require a fact-intensive inquiry that may ultimately constitute a question for the fact-finder. For the reasons noted, we confine our effort to provide clarity to the "unlawful taking" component of the analysis and need not (and do not) reach the saving clause.

III. CONCLUSION

For the reasons stated, we find that plaintiff did not take a vehicle unlawfully within the meaning of

MCL 500.3113(a). Accordingly, we reverse the trial court's order granting summary disposition to defendants. We note that, in and of itself, our finding that plaintiff should not be *denied* PIP benefits under the MCL 500.3113(a) exclusion is not dispositive of whether plaintiff is *entitled* to PIP benefits, or from whom. Those issues remain to be addressed in the trial court. Accordingly, we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

DONOFRIO, P.J., concurred with BOONSTRA, J.

RONAYNE KRAUSE, J. *(concurring in part and dissenting in part)*. I concur in the majority's application of our Supreme Court's recent decision of *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012), to the facts of this case. I respectfully dissent from the majority's analysis of prior caselaw from this Court decided before, and therefore without the benefit of, *Spectrum Health*. Irrespective of whether I believe that analysis to be sound, I believe it is unnecessary; at best, it is dicta. I would limit my analysis to whether the specific plaintiff before us in the instant matter took the particular motorcycle in question "unlawfully" under these circumstances within the meaning of MCL 500.3113(a). I would decline to speculate further as to matters not now before us, and I would also decline to invite the reader to do so. I agree with the result reached by the majority: plaintiff did not take the motorcycle "unlawfully." I therefore also join in the relief ordered.

PEOPLE v RUSSELL

Docket No. 304159. Submitted June 13, 2012, at Detroit. Decided September 4, 2012, at 9:00 a.m. Leave to appeal denied, 494 Mich ___.

Fred Robert Russell, III, was convicted by a jury in the Wayne Circuit Court of assault with intent to do great bodily harm less than murder, MCL 750.84, and reckless driving causing serious impairment of a body function, MCL 257.626. The victim, Deshun Battle, and an associate of the victim, Dijon Deal, had gone to defendant's hotel room, seeking the return of Deal's laptop computer. Deal observed the laptop in defendant's truck when defendant did not initially come out of the room. Deal began hitting the truck window with a crowbar, which prompted defendant to come out of the hotel room and indicate that he would retrieve the computer. Battle got into his own vehicle, and drove around a corner before stopping to work on his speakers. Defendant got into his truck and drove away instead of retrieving the computer for Deal. Deal pursued defendant on foot. Battle was injured when defendant crashed his car into Battle's vehicle, pinning Battle between the two vehicles. Defendant argued that the accident had occurred because he was watching Deal chase after him in the rearview mirror, rather than what was in front of him. Defendant appealed and moved to remand for an evidentiary hearing on the issue of ineffective assistance of counsel. The Court of Appeals granted the motion in an unpublished order, entered December 15, 2011 (Docket No. 304159). On remand, the court, Carole F. Youngblood, J., granted defendant's motion for a new trial, concluding that trial counsel's failure to call a witness to the incident had denied defendant the effective assistance of counsel.

The Court of Appeals *held*:

1. It is improper for a lower court to exceed the scope of an appellate court's remand order. The trial court's order granting defendant a new trial did not exceed the scope of the Court of Appeals' remand order. The order, which directed the trial court to conduct an evidentiary hearing on the issue of ineffective assistance of counsel, make findings of fact and a determination on the record, granted the court authority to grant or deny the motion for new trial.

2. A new trial may be granted on the basis of ineffective assistance of counsel if the defendant establishes (1) that the trial counsel's performance fell below an objective standard of reasonableness, and (2) that but for the counsel's deficient performance, a different result would have been reasonably probable. An appellate court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight. Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy. The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. In addition, the failure to make an adequate investigation constitutes ineffective assistance of counsel if it undermines confidence in the trial's outcome. In this case, the trial court abused its discretion by granting defendant's motion for a new trial. On remand at the evidentiary hearing, Kiesha Yates testified that she was in the hotel room with defendant when she saw one man with a crowbar and one with a bright shiny object hitting defendant's truck. She saw both men run after defendant's truck, as he drove away, while continuing to hold onto the objects in their hands. Defense counsel reviewed Yates's police statement but did not call her as a witness because her statement that two men had chased defendant's vehicle was inconsistent with and contradicted his theory of the case that the victim's injuries were the result of an accident when the victim was hit with the front of defendant's vehicle. Defense counsel was not required to argue that defendant was leaving the parking lot while being pursued by both Deal and the victim because Yates's statement conflicted with the physical evidence. Yates's testimony would have required the victim to be in two places at the same time.

3. A defendant has the right to a public trial, which includes the right to have the courtroom open to the public during jury voir dire. However, the effect of a partial closure of trial does not reach the level of a total closure and only a substantial, rather than a compelling reason for the closure is required. In this case, the trial court did not err by limiting the number of spectators in the court room during jury voir dire. The limited seating capacity in the courtroom constituted a substantial reason for the partial closure.

4. Assault with intent to do great bodily harm less than murder, MCL 750.84, is established by proving (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder. An actor's intent may be inferred from all the facts and circumstances, and because of the difficulty of proving an actor's

state of mind, minimal circumstantial evidence is sufficient. In this case there was sufficient evidence for the jury to find that defendant had committed the crime of assault with intent to do great bodily harm less than murder. A rational jury could have inferred from the confrontation and defendant's acceleration of the vehicle before hitting the victim that defendant had intended to cause the victim great bodily harm. In addition, the jury was free to disbelieve defendant's testimony.

5. In Michigan, each count of an indictment is regarded as if it was a separate indictment and consistency in jury verdicts is not necessary. It is possible for a jury to reach separate conclusions on an identical element of two different offenses. Although consistency is not necessary in Michigan, the verdicts in this case were not inconsistent because defendant's act of driving his vehicle into the victim could have been in willful disregard of the victim's safety, MCL 257.626(2), as well as with the intent to do the victim great bodily harm, MCL 750.84.

Convictions and sentences affirmed and order granting a new trial reversed.

RONAYNE KRAUSE, J., dissenting, would have affirmed the court's conclusion that trial counsel's failure to investigate and call Yates as a witness constituted ineffective assistance of counsel because it deprived defendant of a substantial defense. She was not definitely and firmly convinced that the trial court made a mistake by concluding that Yates's proposed testimony would not contradict the physical evidence but would have contradicted and undermined the victim's testimony.

1. CONSTITUTIONAL LAW — INEFFECTIVE ASSISTANCE OF COUNSEL — TRIAL STRATEGY — INADEQUATE INVESTIGATION.

A new trial may be granted on the basis of ineffective assistance of counsel if the defendant establishes (1) that the trial counsel's performance fell below an objective standard of reasonableness, and (2) that but for the counsel's deficient performance, a different result would have been reasonably probable; an appellate court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight; decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy; the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense; the failure to make an adequate investigation constitutes ineffective assistance of counsel if it undermines confidence in the trial's outcome.

2. CONSTITUTIONAL LAW — RIGHT TO PUBLIC TRIAL — PARTIAL CLOSURE.

A defendant has the right to a public trial, which includes the right to have the courtroom open to the public during jury voir dire; the effect of a partial closure of trial does not reach the level of a total closure and only a substantial, rather than a compelling reason for the closure is required.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training and Appeals, and *Thomas M. Chambers*, Assistant Prosecuting Attorney, for the people.

Phillip D. Comorski for defendant.

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

K. F. KELLY, P.J. Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and reckless driving causing serious impairment of a body function, MCL 257.626. Defendant was sentenced to 19 to 120 months' imprisonment for his assault with intent to do great bodily harm less than murder conviction and 5 to 60 months' imprisonment for his reckless driving causing serious impairment of a body function conviction. We previously entered an order granting defendant's motion to remand so that

> the trial court can conduct an evidentiary hearing and defendant-appellant may move for a new trial on the issue of ineffective assistance of counsel. In addition to the issue of defense counsel's failure to produce a witness, the parties may also address whether defense counsel was ineffective for not objecting to the closure of the courtroom during voir dire and the reasons for closing the courtroom. [*People v Russell*, unpublished order of the Court of Appeals, entered December 15, 2011 (Docket No. 304159).]

The trial court held a *Ginther*[1] hearing, found that trial counsel had been ineffective for failing to call a witness, and granted defendant's motion for a new trial. We hold that the trial court complied with the remand order but erred by granting defendant's motion for a new trial. We affirm defendant's convictions and sentences.

I. BASIC FACTS

The victim, Deshun Battle, and an associate of the victim, Dijon Deal, went to defendant's hotel room, seeking the return of Deal's laptop computer. After defendant had failed to emerge from the hotel room to return the computer, Battle observed a computer in defendant's truck and pointed it out to Deal. Deal grabbed a crowbar and began applying the crowbar against the window of defendant's truck, as if to break the window. Defendant came out to the parking lot and indicated that he would retrieve the computer. At that point, Battle decided that he did not want anything more to do with the situation. Battle got into his own vehicle, drove it around a corner and parked it in order to fix his speakers. Instead of retrieving the computer as promised, defendant got in his truck, and drove away. Deal pursued defendant on foot. Defendant claimed that he had been looking in his rearview mirror when he crashed into the back of Battle's vehicle, pinning Battle between the two vehicles. Battle suffered extensive injuries, including the amputation of one of his legs. The prosecution argued that defendant had intentionally rammed his vehicle into Battle. Defendant denied that his driving was reckless or that he had intended to cause Battle harm; instead, defendant explained that it was simply an accident and that he had not been

[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

looking where he was driving because he had been watching Deal in his rearview mirror.

The jury convicted defendant of assault with intent to do great bodily harm less than murder and reckless driving causing serious impairment of a body function. Defendant appealed his convictions and we granted his motion to remand for a *Ginther* hearing on defendant's claim that defense counsel was ineffective for failing to investigate and call a key witness and for failing to object to the closing of the courtroom during voir dire.

II. THE *GINTHER* HEARING

At the *Ginther* hearing defendant's girlfriend, Kiesha Yates, testified that she was with defendant at the hotel. She heard loud noises outside their hotel room and saw two men banging on defendant's truck, one with a crowbar, and one with a "shiny metal thing." Defendant then exited the room. Yates saw defendant get into his truck and drive off. She testified that the two men had chased after defendant's vehicle with objects in their hands. Yates gave the police a written statement at the scene; however, she was not contacted by defense counsel David Lankford.

Defendant testified that during trial preparation he told Lankford that Yates was with him at the time of this incident and wished to have her called as a witness. Lankford told defendant that he did not feel comfortable calling civilian witnesses.

Lankford testified that he was aware of Yates and another woman being witnesses to this incident. Lankford never talked to Yates or the other woman personally; however, he did review Yates's police statement. Lankford believed that Yates's statement that two men had chased defendant's vehicle was inconsistent with and contradictory to his theory of the case that Battle

was hit with the front of defendant's vehicle. Lankford assumed that the two men Yates referred to in her statement were Battle and Deal.

The trial court ruled as follows:

> The witness that was not called is Kiesha Yates. She testified that Mr. Russell was her boyfriend. She was in the motel room and she heard loud banging noises outside. She looked out the window and saw two men banging on Mr. Russell's S.U.V. One had a crowbar and the other man had a bright, shiny object in his hand. Mr. Russell then went outside and got into the truck, started the engine and drove away. The two men ran after him both holding onto the objects that they had in their hand.
>
> This testimony is extremely important. It contradicts the testimony of both alleged victims Mr. Battle and Mr. Deal.
>
> David Lankford, the defendant's attorney, testified that Mr. Russell did tell him about the testimony of Miss Yates and another woman. He believed that Miss Yates' testimony as told to him by Mr. Russell contradicted his theories and the physical evidence. He did not, however, indicate a theory that was contradicted or the physical evidence that was contradicted.
>
> Mr. Russell did say that he only saw one man running after his S.U.V., but the statement is not contradicted by Miss Yates because she had a view entirely different than Mr. Russell. She was viewing the vehicle from the outside and Mr. Russell was viewing whoever was chasing him only through the windows of the car.
>
> It was ineffective assistance of counsel for Mr. Lankford not to call Miss Yates, and even more so not to speak with her, the other female witness and any other witnesses. It is often a mistake to rely only on witnesses' statements and not speak with the witness in person or at least by telephone.
>
> Not only does Miss Yates' testimony contradict and impeach the testimony of Mr. Battle and Mr. Deal, it

> supports the testimony of Mr. Russell. Clearly a different result could have occurred with this testimony.

The trial court rejected defendant's claim that the courtroom had been closed during jury voir dire and declined to grant relief on that basis.

The matter is now before us after remand.

III. SCOPE OF REMAND ORDER

From the outset, we reject the prosecution's argument that the trial court's order granting defendant a new trial exceeded the scope of this Court's remand order.

When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of the order. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005). Again, in relevant part, the order provided:

> The Court orders that the motion to remand pursuant to MCR 7.211(C)(l) is GRANTED, and the matter is remanded to the trial court so that the trial court can conduct an evidentiary hearing and defendant-appellant may move for a new trial on the issue of ineffective assistance of counsel. In addition to the issue of defense counsel's failure to produce a witness, the parties may also address whether defense counsel was ineffective for not objecting to the closure of the courtroom during voir dire and the reasons for closing the courtroom.
>
> . . . The trial court is to *hear and decide* the matter within 56 days of the Clerk's certification of this order. Defendant-appellant must also file with the Clerk of this Court copies of all *orders entered* on remand within 14 days after entry.
>
> The *trial court is to make findings of fact* ***and a determination*** on the record. [Emphasis added.]

We also retained jurisdiction "in the cause and the time for proceeding with the appeal in this Court begins upon issuance of an order in the trial court that finally disposes of the remand proceedings." It would be meaningless for this Court to explicitly direct that a motion be filed without necessarily permitting the trial court to either deny or grant the motion. This is particularly true when the trial court was specifically directed to make a "determination on the record." We could not have been clearer that the trial court had the ability to and was, in fact, directed to make such a determination. Therefore, the lower court order granting defendant's motion for a new trial did not exceed this Court's remand order.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel. We disagree. "We review for an abuse of discretion a trial court's decision to grant or deny a new trial. An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes." *People v Terrell*, 289 Mich App 553, 558-559, 797 NW2d 684 (2010) (citation omitted). "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. We review the trial court's findings of fact at a *Ginther* hearing for clear error, and review questions of constitutional law de novo." *People v McCauley*, 287 Mich App 158, 162, 782 NW2d 520, 523 (2010) (citation omitted).

> A defendant must meet two requirements to warrant a new trial because of the ineffective assistance of trial counsel. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong

> presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable. [*People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011) (citations omitted).]

This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

A. FAILURE TO CALL KIESHA YATES

Defendant argues that counsel was ineffective for failing to call Yates as a witness at trial. We disagree.

Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Similarly, "[t]he failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

In his appellate brief, defendant writes:

> The evidence in this case was not overwhelming. Battle and the other witness, Mr. Deal, gave completely different accounts of the incident. The only evidence linking [defendant] to the assaultive offense was the testimony of Mr. Battle. Clearly, Mr. Battle's version of the events (that he was basically in the wrong place at the wrong time) would have been severely contradicted by Ms. Yates, who would have testified that not only was Mr. Battle an active participant, but that he was also armed with a weapon at the time [defendant] was attempting to flee the area.

At trial, defendant's theory of the case was that this was a terrible accident and that he simply did not see Battle before the point of contact. During opening statements, defense counsel stated:

> Folks, this is -- it is truly a tragedy. My heart goes out to this young man. He's 20 years old. He's without a leg. But here they have to show one of the three charges intentional act . . . . And I think the evidence will on that last, which is that last count reckless, I think there is some evidence to support the statement that I was being chased by Mr. Deal and didn't realize, didn't see him.

And during closing argument, defense counsel argued:

> Now we know that [defendant] struck Battle who was standing at the back of a Dodge Durango, so let's look at the first part of that. Looking out of his rearview mirror at Deal.
>
> All right. Is there any reason that Mr. Russell would be looking out of his rearview mirror at Deal? Yes, lots of reasons. And, folks, with regards to well Battle had left and he allegedly had a shotgun and whatever, let me just put that to rest real quick. There is no way, there is no evidence that Mr. Russell knew where Mr. Battle was with the Durango. It was on the other side of the building. It obstructs views and it is not until the last possible moment that he could have even been aware of it. That is -- that's a fact.

At the *Ginther* hearing, defense counsel testified that Yates's "statement was, in my opinion, contradictory, inconsistent with the theory of the case" and "entirely inconsistent with the physical evidence." Counsel explained that "I didn't see how Mr. Battle could be chasing that vehicle and then basically end up in front of the path of the Tahoe."

We believe that the trial court abused its discretion by granting defendant a new trial. Specifically, we fail to see how defense counsel's decision not to call Yates as a

witness was anything other than sound trial strategy. Defendant argues that Yates's potential testimony would have contradicted Battle's testimony that Battle was simply in the wrong place at the wrong time when he was struck by the vehicle. Defendant believes that defense counsel should have set forth a theory that defendant was racing out of the parking lot in order to avoid Deal, who was wielding a crow bar, and Battle, who was wielding a gun. But Yates's statement conflicted with the physical evidence. Michigan State Police Sergeant Kevin Lucidi testified that defendant's vehicle was traveling at a rate of approximately 19 miles per hour just prior to his airbag deploying. Assuming (as does defendant) that Battle was one of the two individuals who had pursued defendant's vehicle on foot, an untenable conclusion would have to be drawn—that Battle initially ran behind defendant's vehicle, passed it on foot at a speed of over 19 miles per hour, and then positioned himself behind his own vehicle before the point of impact. We cannot fault defense counsel for failing to call Yates as a witness when her testimony would have required Battle to be in two places at the same time.

Furthermore, even if defense counsel's decision not to further investigate Yates fell below an objective standard of reasonableness, defendant has failed to show that defense counsel's decision not to call Yates as a witness prejudiced him. Defense counsel argued that this incident was an accident; defendant was looking in his rearview mirror at Deal when he hit Battle, who was in front of him. Defendant was not denied a substantial defense. Furthermore, it is unclear how Yates's testimony would have contributed to this defense given that it seems contradictory. Defendant failed to show that he was denied the effective assistance of counsel, and the

trial court abused its discretion by granting defendant's motion for a new trial.

B. FAILURE TO OBJECT TO CLOSURE OF THE COURTROOM

Defendant argues that defense counsel was ineffective by failing to object to the partial closure of the courtroom during jury voir dire, thereby depriving defendant of his right to a public trial, as guaranteed by the Sixth Amendment, US Const, Am VI. We disagree.

Defense counsel and the trial court engaged in the following dialogue before trial:

> *Mr. Lankford*: There are a couple of family members on both sides.
>
> We are -- not going to be a lot of room here while selecting the jury, so I don't know if you want to deal with the people that are here for support for one side or the other.
>
> *The Court*: Each side can have one person sit on that special bench right there.
>
> Now, Mr. Lankford, are you calling witnesses?
>
> *Mr. Lankford*: It would be only the defendant possibly, judge.
>
> *The Court*: Okay. So none of the people here in support of the defendant would be called as witnesses?
>
> *Mr. Lankford*: No.
>
> *The Court*: Well of course they can be in the courtroom the whole time then but not while we pick -- only one while we're picking the jury or two maybe.

Defendant did not object to the partial closure. Our Supreme Court recently held that the forfeiture rule stated in *People v Carines*[2] applies with equal force to a defendant's claim that the trial court violated his Sixth

[2] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Amendment right to a public trial. *People v Vaughn*, 491 Mich 642, 664 821 NW2d 288 (2012). As such, defendant must establish (1) that an error occurred, (2) that the error was "plain," (3) that the error affected his substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id*. at 664-665.

A defendant has the right to a public trial, which includes the right to have the courtroom open to the public during jury voir dire. Id. at 650-652. However, the effect of a partial closure of trial does not reach the level of a total closure and only a substantial, rather than a compelling reason for the closure is required. *People v Kline*, 197 Mich App 165, 170; 494 NW2d 756 (1992).

The record reveals that the voir dire proceedings were partially closed as a result of the limited capacity of the courtroom. The limited capacity of the courtroom was a substantial reason for the closure, and thus, this partial closure did not deny defendant his right to a public trial. Furthermore, defense counsel was not ineffective by failing to object, because there was no error. See *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004) ("[T]rial counsel is not ineffective when failing to make objections that are lacking in merit.").

V. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues that the evidence was insufficient to establish the intent element of assault with intent to do great bodily harm less than murder. We disagree.

"This Court reviews de novo challenges to the sufficiency of the evidence to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012) (quotation marks and citation omitted). This Court reviews the evidence in the light most favorable to the prosecution. *Id*.

"The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (quotation marks and emphasis omitted). Intent to do great bodily harm is intent to do serious injury of an aggravated nature. *Id*. "An actor's intent may be inferred from all the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Gonzalez*, 256 Mich App 212, 226; 663 NW2d 499 (2003) (quotation marks omitted). "[A] jury is free to believe or disbelieve, in whole or in part, any of the evidence presented." *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999).

The evidence established that Battle and Deal went to defendant's hotel room to confront defendant about Deal's laptop and to retrieve it from defendant. Battle and Deal asked for the laptop once or twice. Defendant assured them that he was going to get the laptop. After defendant neglected to retrieve Deal's laptop, which Battle saw in defendant's truck that was parked right in front of defendant's hotel room, Deal went to defendant's truck, acted like he was going to smash defendant's window, and then actually hit the window once. When defendant saw Deal hit his truck window, he

came out of the hotel room and said, "Wait. Hold on." Defendant initially acted as though he was going to retrieve the laptop, but instead got into his truck, backed up, and pulled away. As defendant was backing up, Deal threw the crowbar at defendant's vehicle and then chased the vehicle. Defendant then struck Battle with his vehicle.

Michigan State Police Sergeant Kevin Lucidi testified as an expert in crash reconstruction. Lucidi testified that just before the airbag of defendant's vehicle deployed, the vehicle was accelerating and going approximately 19 miles per hour.

A rational jury could have inferred from the recent confrontation, coupled with the evidence that defendant was accelerating his vehicle before hitting Battle, that defendant had intended to cause Battle great bodily harm. Additionally, the jury was free to disbelieve the evidence that defendant was looking into his rearview mirror when he struck Battle. Therefore, the evidence was sufficient for a rational trier of fact to find that defendant committed assault with intent to do great bodily harm less than murder.

VI. INCONSISTENT VERDICTS

Finally, defendant argues that his verdicts were inconsistent and require reversal of his conviction of assault with intent to do great bodily harm less than murder. We disagree.

This Court reviews de novo questions regarding inconsistent verdicts, which are constitutional issues. See *People v Vaughn*, 409 Mich 463, 465-467; 295 NW2d 354 (1980). Under Michigan law, each count of an indictment is regarded as if it were a separate indictment and consistency in jury verdicts is not necessary. *Id*. at 465-466. Also, "it is possible for a jury to reach

separate conclusions on an identical element of two different offenses." *People v Garcia*, 448 Mich 442, 464; 531 NW2d 683 (1995).

The Michigan Vehicle Code, MCL 257.1 *et seq*., defines reckless driving as driving "in willful or wanton disregard for the safety of persons or property . . . ." MCL 257.626(2). Anyone who violates MCL 257.626(2), and in doing so causes serious impairment of a body function to another person, is guilty of a felony. MCL 257.626(3). "The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *Brown*, 267 Mich App at 147 (quotation marks and emphasis omitted). This Court has recognized that "[s]pecific intent has been defined as 'meaning some intent in addition to the intent to do the physical act which the crime requires,' while general intent 'means an intent to do the physical act—or, perhaps, recklessly doing the physical act—which the crime requires.' " *People v Lerma*, 66 Mich App 566, 569; 239 NW2d 424 (1976), quoting LaFave & Scott, Criminal Law, p. 343.

Defendant asserts the inconsistency of the verdicts with regard to the intent elements of the respective charges. Defendant's verdicts were not necessarily inconsistent. Defendant's act of driving his vehicle into Battle could have been in willful disregard of Battle's safety and simultaneously with the intent to do Battle great bodily harm. Even so, consistency in jury verdicts in criminal cases is not necessary. *Garcia*, 448 Mich at 464; *Vaughn*, 409 Mich at 465-467. Defendant's claim is without merit.

Defendant's convictions and sentences are affirmed and the order granting new trial is reversed.

SAWYER, J., concurred with K. F. KELLY, P.J.

RONAYNE KRAUSE, J. (*dissenting*). I respectfully dissent from the majority's conclusion that the trial court abused its discretion by granting defendant's motion for a new trial.[1] I would therefore affirm the trial court's order and remand for further proceedings consistent with that order.

To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance resulted in prejudice. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). Determining the issue of effectiveness of counsel entails an analysis of the facts and of the law; the trial judge "must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *Id*. at 289 (quotation marks omitted). We review the trial court's factual findings for clear error, meaning we must be definitely and firmly convinced that the trial court made a mistake in its factual findings. *Id*. We review de novo questions of law. *Id*. We also review de novo whether a defendant was prejudiced. *People v Dendel*, 481 Mich 114, 132 n 18; 748 NW2d 859 (2008). "A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion." *People*

[1] I note that the majority and I unanimously agree that the trial court was fully authorized to grant the motion by this Court's remand order. I feel it is worth emphasizing what the majority already states, that it would be absurd for this Court to have explicitly directed that a motion be made without necessarily, if impliedly, permitting the trial court to either deny or grant that motion. The majority and I disagree as to whether the trial court's determination arrived at the proper conclusion, *not* as to whether the trial court was empowered to make that determination.

v Blackston, 481 Mich 451, 460; 751 NW2d 408 (2008) (citation omitted). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010).

A defendant is entitled to a new trial on the basis of ineffective assistance of counsel if two requirements are satisfied: first, that counsel's performance was objectively unreasonable and second, that it was reasonably probable that the outcome of the proceedings would have been different but for counsel's deficient performance. *Armstrong*, 490 Mich at 289-290. Defendant's claim of ineffective assistance is premised on his trial counsel's failure to call an eyewitness to some of the events that immediately led up to the specific events on which defendant's convictions were based. Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court does not generally second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

However, an attorney's "failure to call witnesses . . . constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004). Additionally, the failure to call a witness may constitute ineffective assistance of counsel when the witness' testimony is substantial, even when the testimony is cumulative. *People v Johnson*, 451 Mich 115, 120-124; 545 NW2d 637 (1996).

Importantly, therefore, whether counsel's failure to call a witness or investigate a potential witness was objectively deficient may depend significantly on a factual inquiry into the effect the witness might have had on the outcome of the proceedings.

During the trial, defendant's theory of the case was that the victim, Deshun Battle, and an associate of the victim, Dijon Deal, had come to his hotel room seeking the return of a laptop computer. Deal held a crowbar, and at one point defendant indicated that he believed Battle had a shotgun. Deal began applying the crowbar against the window of defendant's truck, as if to break the window. Defendant exited the hotel room, got in his truck, and attempted to drive away while being pursued by Deal. Meanwhile, Battle, according to his own testimony, drove his own car around a corner, parked it, and exited the vehicle to perform maintenance on his car's speakers. Defendant claimed to have been looking in his rearview mirror at the man chasing him when he crashed into the back of the other vehicle, pinning Battle between the two vehicles. In other words, defendant's theory was that his driving was neither reckless under the circumstances nor was it the product of any sort of intent to cause harm.

At the *Ginther* hearing,[2] Kiesha Yates, defendant's girlfriend and the person defendant argues his trial counsel should have called as a witness at trial, testified that she had been with defendant at the hotel. She heard some loud noises outside their hotel room. She looked out of the window and saw two men banging on defendant's truck, one with a crowbar, and one with a

[2] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973). This Court's remand order only referred to an "evidentiary hearing," but as the majority indicates, the trial court correctly interpreted this as a remand specifically for a *Ginther* hearing.

"shiny metal thing." Defendant then exited the room. From the window of the room, Yates saw defendant get into his truck and drive off. The two men chased after defendant's vehicle with objects in their hands. Yates gave the police a written statement at the scene; however, she was not contacted by defense counsel. Defendant testified that during trial preparation, he told defense counsel that Yates was with him at the time of this incident, and that he wished to have her called as a witness. However, defense counsel indicated that he did not feel comfortable calling "civilian" witnesses.

Defense counsel testified that he was aware that Yates and another woman witnessed the incident. Defense counsel never talked to Yates or the other woman personally. However, he did review Yates's police statement. Defense counsel believed that Yates's statement that two men chased defendant's vehicle was inconsistent or contradictory to his theory of the case that Battle was hit with the front of defendant's vehicle. Defense counsel assumed without knowing that the two men Yates referred to in her statement were Battle and Deal. However, he conceded that Yates's statement did not necessarily contradict the physical evidence.

The trial court concluded that trial counsel was ineffective because of his failure to investigate and to call a particular witness. The court reasoned:

> The witness that was not called is Kiesha Yates. She testified that Mr. Russell was her boyfriend. She was in the motel room and she heard loud banging noises outside. She looked out the window and saw two men banging on Mr. Russell's S.U.V. One had a crowbar and the other man had a bright, shiny object in his hand. Mr. Russell then went outside and got into the truck, started the engine and drove away. The two men ran after him both holding onto the objects that they had in their hand.

> This testimony is extremely important. It contradicts the testimony of both alleged victims Mr. Battle and Mr. Deal.
>
> . . . The defendant's attorney, testified that Mr. Russell did tell him about the testimony of Miss Yates and another woman. He believed that Miss Yates' testimony as told to him by Mr. Russell contradicted his theories and the physical evidence. He did not, however, indicate a theory that was contradicted or the physical evidence that was contradicted.
>
> Mr. Russell did say that he only saw one man running after his S.U.V., but the statement is not contradicted by Miss Yates because she had a view entirely different than Mr. Russell. She was viewing the vehicle from the outside and Mr. Russell was viewing whoever was chasing him only through the windows of the car.
>
> It was ineffective assistance of counsel for [defense counsel] not to call Miss Yates, and even more so not to speak with her, the other female witness and any other witnesses. It is often a mistake to rely only on witnesses' statements and not speak with the witness in person or at least by telephone.
>
> Not only does Miss Yates' testimony contradict and impeach the testimony of Mr. Battle and Mr. Deal, it supports the testimony of Mr. Russell. Clearly a different result could have occurred with this testimony.

The only defense presented in support of defendant's case was made during closing argument. Again, defense counsel argued that defendant "was looking out of his rearview mirror at Deal when he struck Battle who was standing at the back of the Dodge Durango [Battle's vehicle]." Counsel also argued that there was no evidence that defendant knew where Battle was physically located at the time of the incident.

I note initially that counsel's subjective discomfort with "civilian witnesses," whatever those might be in this context, is simply not, at least to my mind, a sound

strategic reason for failing to investigate or call any such witness who could cast doubt on the credibility of a complainant or other prosecution witness. More significantly, the applicable standard of review in this case is that of reviewing the trial court's factual findings for clear error, there being no real legal dispute before this Court that I can discern. Consequently, our inquiry is not whether we would have arrived at the same conclusions, but whether the trial court's conclusions definitely appear wrong.[3]

I find no clear error in the trial court's conclusion that, contrary to defense counsel's view of Yates's testimony, she did not contradict either defendant's theory of the case or the physical evidence. It is common knowledge that the viewing perspective from inside a moving vehicle is not perfect; the fact that defendant apparently did not see Battle in his rearview mirror does not constitute evidence that Battle was not giving chase. Furthermore, because defendant apparently never exceeded 20 miles an hour and went around a corner, there is no reason why Battle could not have initially pursued defendant from behind and ended up running in front of him. The majority finds this possibility "untenable," however as I interpret the evidence, this runner could have taken a "short cut" across the corner to get in front of the SUV. This scenario is certainly not impossible or contrary to the physical evidence, and I find it plausible enough that I can imagine no sound strategic reason not to seek to present it to a jury. It is also not the likeliest of scenarios, but our role on appeal

[3] This Court should not "simply defer to the trial court's judgment regarding prejudice." *Dendel*, 481 Mich at 132 n 18. However, I do not believe *Dendel* dictates that the trial court's conclusion is entitled to no deference. In any event, I believe the analysis critical to the outcome of this appeal is more factual, and the trial court's conclusions of fact are entitled to deference.

is not to determine what conclusion we would have drawn had we been sitting as the trial court, but rather whether we are definitely and firmly convinced that the trial court made a mistake.

At the same time Yates's testimony supports the possibility that Battle was armed with a shotgun, and it directly contradicts Battle's testimony that he had departed from the dispute before defendant got into his truck. If the jury had chosen to find her testimony credible—which is not an assessment we may make—it could have found that Battle was not merely "minding his own business" elsewhere but was instead participating in armed pursuit of defendant with a weapon capable of killing defendant, notwithstanding the fact that defendant was inside a moving vehicle. The jury could have found that under the circumstances defendant was neither driving recklessly nor intending to harm Battle.

I am not definitely and firmly convinced that the trial court made a mistake by concluding that Yates's proposed testimony would not contradict the physical evidence but would have contradicted and undermined Battle's testimony. *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008). The trial court is in the better position to evaluate the credibility of the witnesses who appeared before it, both at trial and at the *Ginther* hearing. The trial court will have to hear the matter again on retrial and its findings are entitled to deference. Yates's testimony would have weakened the prosecution's case and supported defendant's defense. The trial court's conclusion that her testimony was sufficiently important and that counsel's failure to investigate and call her as a witness deprived defendant of a substantial defense and undermined confidence in the outcome of the trial should be affirmed. Because I

can discern no sound strategic reason for defense counsel's failure to offer Yates's testimony, I conclude that the trial court did not abuse its discretion by granting defendant's motion for a new trial, and I would affirm that order and remand for further proceedings.

BRECHT v HENDRY

Docket No. 308343. Submitted July 17, 2012, at Detroit. Decided July 24, 2012. Approved for publication September 11, 2012, at 9:00 a.m.

Melissa D. Brecht had a child with Lee Allen Hendry, II, in November 2007. The Tuscola Circuit Court, Family Division, W. Wallace Kent, J., granted Brecht sole legal and physical custody of the child in September 2009 and awarded Hendry parenting time. The custody order provided, as required by MCR 3.211(C)(1) and (3), that the child's domicile could not be removed from Michigan without court approval and that neither parent could change the child's legal residence except in compliance with MCL 722.31. Nevertheless, Brecht later moved to North Dakota with the child without obtaining court approval. In June 2011, Hendry moved for Brecht to show cause and for a change to the custody and parenting-time order. After a hearing, the court, Amanda L. Roggenbuck, J., ordered Brecht to return the child to Michigan. Brecht then moved for permission to change the child's domicile to North Dakota on the basis of the factors set forth in MCL 722.31(4), which the Legislature had adapted from *D'Onofrio v D'Onofrio*, 144 NJ Super 200 (1976). After considering these factors, the court issued an order denying the motion. Brecht moved for relief from this order under MCR 2.612(C)(1), arguing that, because she had sole custody of the child, the court had erred by considering the factors in MCL 722.31(4) and was required to approve her request. The court denied the motion, ruling that it was in the child's best interests not to leave Michigan. The court denied Brecht's motion for reconsideration, and Brecht appealed.

The Court of Appeals *held*:

1. The requirements set forth in MCL 722.31(1) do not apply to a parent who moves for permission to change the legal residence of a child if the parent has sole custody, and the court may not consider the factors set forth in *D'Onofrio* or in MCL 722.31(4) when exercising its discretion under MCR 3.211(C)(1) to grant or deny that parent's request. The General Court Rules, which were adopted in 1963, contained a rule mandating that every judgment involving child custody contain a provision requiring parents to obtain the court's permission before moving the child's domicile

out of Michigan. The Court of Appeals construed this rule, which is now MCR 3.211(C)(1), to apply to both sole and joint custody orders and to require that trial courts consider the *D'Onofrio* factors before making their decision. These factors include consideration of the prospective advantages of the move, the custodial parent's motives in seeking the move, the noncustodial parent's motives in resisting the move, and the existence of a realistic opportunity for visitation if the move is allowed. The common law developed under MCR 3.211(C)(1) remained the sole law applicable to requests for a change in domicile until the Legislature enacted 2000 PA 422, codified at MCL 722.31, which provided that a parent who had joint legal custody could not change the child's legal residence by more than 100 miles without permission from the court or the other parent and that, when considering a motion for permission to change a child's legal residence, the court must consider a series of factors that were derived from the *D'Onofrio* factors. Because MCL 722.31 and MCR 3.211(C)(1) can be construed harmoniously, the Court of Appeals panel in this case would have concluded that courts must fully comply with both. However, because previous panels had held that the Legislature's decision to exempt parents with sole legal custody from the requirements of MCL 722.31 not only eliminated the court's common-law duty to consider the *D'Onofrio* factors under either MCL 722.31 or under MCR 3.211(C)(1) but also rendered it error for a court to consider the *D'Onofrio* factors as codified in MCL 722.31(4) if MCL 722.31 did not apply, whether and to what extent MCR 3.211(C)(1) has any continuing validity was for the Supreme Court to determine.

2. The trial court erred to the extent it determined that MCL 722.31 applied to Brecht's request to move because MCL 722.31 does not apply to orders granting sole legal custody. Although the court still had to determine whether Brecht should be permitted to move the child out of the state under MCR 3.211(C)(1), the court could not consider the *D'Onofrio* factors in determining whether to grant the request. Once the court determined that MCL 722.31 did not apply, it should have granted Brecht's request as a matter of course.

Order vacated; case remanded for further proceedings.

1. PARENT AND CHILD — CHILD CUSTODY — CHANGES OF CHILD'S DOMICILE OR RESIDENCE — PARENTS WITH SOLE LEGAL CUSTODY — 100-MILE RULE.

MCL 722.31, which prohibits the parent of a child whose custody is governed by court order from changing the child's legal residence to a location that is more than 100 miles from the child's legal

residence without the consent of the other parent or permission of the court, does not apply to parents with sole legal custody.

2. PARENT AND CHILD — CHILD CUSTODY — CHANGES OF CHILD'S DOMICILE OR RESIDENCE — PARENTS WITH SOLE LEGAL CUSTODY — REQUIREMENT OF COURT APPROVAL TO CHANGE DOMICILE OR RESIDENCE FROM MICHIGAN.

A trial court considering the request of a parent with sole custody of a minor to move the minor's domicile or residence from Michigan pursuant to MCR 3.211(C)(1) may not consider the factors set forth in *D'Onofrio v D'Onofrio*, 144 NJ Super 200 (1976), or the codification of those factors in MCL 722.31(4); these factors include consideration of the prospective advantages of the move, the custodial parent's motives in seeking the move, the noncustodial parent's motives in resisting the move, and the existence of a realistic opportunity for visitation if the move is allowed; the trial court must exercise its discretion to grant or deny the request under MCR 3.211(C)(1) regardless of the fact that it is unclear how that discretion is to be exercised.

Neil C. Szabo for the plaintiff.

John P. Lozano for the defendant.

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

M. J. KELLY, J. Plaintiff, Melissa Danelle Brecht, appeals by leave granted the trial court's order denying her motion for permission to change the domicile of her daughter with defendant Lee Allen Hendry, II. Because we conclude that the trial court improperly applied the law governing a motion to change domicile, we vacate the trial court's order and remand for proceedings consistent with this opinion.

I. BASIC FACTS

Brecht and Hendry had their daughter in November 2007. In September 2009, the trial court awarded Brecht sole legal and physical custody of the child and gave Hendry parenting time. However, the order also provided that, at least 48 hours before exercising

parenting time, Hendry had to notify Brecht about his intent to exercise parenting time and had to provide Brecht with the address and telephone number for the location where he intended to exercise the parenting time. As required under MCR 3.211(C)(1) and (3), the custody order provided that the domicile of the minor child could not be removed from the state of Michigan without the court's approval and that a parent whose custody or parenting time was governed by the order could not change the child's legal residence unless the change complied with MCL 722.31.

In June 2011, Hendry asked the trial court to order Brecht to show cause and requested to change the custody and parenting time order after Brecht moved to North Dakota with their daughter without first obtaining the trial court's permission. After holding a hearing, the trial court entered an order requiring Brecht to return the child to Michigan.

Thereafter, Brecht moved for permission to change the child's domicile from Michigan to North Dakota. At the evidentiary hearing Brecht presented evidence on the factors enumerated under MCL 722.31(4) and argued that the trial court should grant her motion on that basis. After considering the factors, the trial court denied the motion for a change in domicile.

In October 2011, Brecht moved for relief from the order under MCR 2.612(C)(1)(a), (e), and (f). Specifically, she argued that the trial court erred when it considered the factors stated under MCL 722.31(4) because those factors do not apply when a parent with sole custody seeks to change the child's domicile. She further argued that, in cases where a parent has sole custody, the court is required to approve a request to change the child's domicile out of state after the parent presents proof that he or she has sole custody. The trial court disagreed:

> I absolutely appreciate counsel's argument that the court has no option and no choice in sole custody cases. I disagree with that. I believe that the court is required to look at what is in the best interest of the child.
>
> And at this point based on the facts that this court has been presented with over and over and over with this case, I do not believe it is in her best interests to leave the State of Michigan. I am not vacating my order. The order will stand.

After the trial court entered an order denying Brecht's motion for reconsideration, Brecht appealed.

II. CHANGE OF DOMICILE

A. STANDARD OF REVIEW

On appeal, Brecht argues that the trial court erred when it denied her motion to change domicile on the basis of the factors enumerated under MCL 722.31(4). Specifically, she argues that the trial court *cannot* consider those factors when analyzing her request because our Legislature provided that those factors do not apply in situations involving sole custody. This Court reviews de novo the proper interpretation and application of statutes and court rules. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). This Court also reviews de novo as a question of law the proper interpretation and application of the common law, such as the common law governing petitions for a change of domicile. See *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25, 53, 83; 709 NW2d 174 (2005), rev'd in part on unrelated grounds 479 Mich 280 (2007).

B. CUSTODY, DOMICILE, AND COURT SUPERVISION

1. MCR 3.211(C)(1)

Michigan courts have the authority to resolve disputes concerning the custody of children, whether as an

original action or incidentally from another action. See MCL 722.27(1). In such cases, the trial court must "declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with this act." MCL 722.24(1). Moreover, after a Michigan court has entered a judgment or order governing child custody, the court retains jurisdiction over the child and may modify its order or judgment until the child reaches—at the latest—age 19 years and six months. MCL 722.27(1)(c). Thus, Michigan courts have a continuing interest in protecting the children subject to custody orders and ensuring that the parents continue to meet their obligations.

Until 1963, a parent could change a child's domicile without the court's permission unless otherwise provided in the original judgment or order. However, in 1963, our Supreme Court adopted the General Court Rules, which included a provision requiring every judgment involving child custody to contain a requirement that parents obtain the court's permission before moving the child's domicile out of this state. See GCR 1963, 729.4(1). Our Supreme Court adopted this rule in order to ensure the efficient administration of our courts' continuing jurisdiction over children subject to court orders and to ensure that the Friend of the Court would have notice and an opportunity to make recommendations consistent with its obligations. See committee comments to GCR 1963, 727.2 (noting that courts may have difficulty exercising their jurisdiction when a parent moves the child from the state) and GCR 1963, 729.4 (noting that the purpose of GCR 1963, 729.4 was to "facilitate continuing supervision over the child"), reprinted in 4 Honigman & Hawkins, Mich Court Rules Annotated (2d ed, 1967), pp 390-391, 429.

This Court determined that GCR 1963, 729.4—current MCR 3.211(C)(1)—gave trial courts the discretion to approve or deny a parent's request to move a child's domicile from this state. See *Lem v Lem*, 12 Mich App 174, 177; 162 NW2d 683 (1968) (reviewing the trial court's reasons for granting permission and determining that the decision was not an abuse of discretion). This Court did not at first provide the trial courts with any guidance for evaluating these requests; rather, the trial court could presumably premise its decision on any factors that it deemed relevant to the requested change and this Court would uphold those decisions as long as they did not amount to an abuse of discretion. See *id.* However, some panels of this Court instructed trial courts to consider the request in light of factors taken from the decision in *D'Onofrio v D'Onofrio*, 144 NJ Super 200; 365 A2d 27 (1976). See *Scott v Scott*, 124 Mich App 448, 452; 335 NW2d 68 (1983); *Henry v Henry*, 119 Mich App 319, 323; 326 NW2d 497 (1982); *Watters v Watters*, 112 Mich App 1, 12-13; 314 NW2d 778 (1981).

Under the so-called *D'Onofrio* factors, a trial court should consider the rights of the noncustodial parent as well as the rights of the custodial parent in determining whether to grant the requested change in domicile:

> "(1) 'It should consider the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children.
>
> "(2) 'It must evaluate the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the noncustodial parent, and whether the custodial parent is likely to comply with substitute visitation orders when she is no longer subject to the jurisdiction of the courts of this State.

> "(3) 'It must likewise take into account the integrity of the noncustodial parent's motives in resisting the removal and consider the extent to which, if at all, the opposition is intended to secure a financial advantage in respect of continuing support obligations.
>
> "(4) 'Finally, the court must be satisfied that there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parental relationship with the noncustodial parent if removal is allowed.' " [*Henry*, 119 Mich App at 323-324, quoting *D'Onofrio*, 144 NJ Super at 206-207.]

Eventually this Court held that trial courts *must* consider the *D'Onofrio* factors when resolving a parent's request to move the child's domicile outside this state. See *Overall v Overall*, 203 Mich App 450, 458; 512 NW2d 851 (1994). Further, this Court recognized that MCR 3.211(C)(1) applied to both sole and joint custody orders. See *Scott*, 124 Mich App at 452 (applying the *D'Onofrio* factors to a joint custody situation); *Henry*, 119 Mich App at 324 (applying the *D'Onofrio* factors to a sole custody situation). Accordingly, under the common law applicable to requests for a change in domicile under MCR 3.211(C)(1), a parent with sole or joint custody could not change the domicile of a child to a location outside this state without obtaining the trial court's permission and the trial court had to make its decision after considering the *D'Onofrio* factors, but that decision would not be disturbed on appeal absent an abuse of discretion.

2. THE 100-MILE RULE

The common law governing requests for a change of domicile under MCR 3.211(C)(1) remained the sole law applicable to requests for a change in domicile until the Legislature enacted 2000 PA 422. In its analysis of this

bill,[1] the Senate Fiscal Agency noted that MCR 3.211(C)(1) limited a parent's ability to relocate a child's residence outside Michigan, but left "movement within Michigan . . . unencumbered . . . ." Senate Legislative Analysis, SB 1244, January 22, 2001, p 1. It explained that this could lead to incongruous results: "[A] parent living in Monroe, Michigan, could be prevented from moving 15 miles or so to Toledo, Ohio, without court approval or consent from the other parent, but could move 620 miles to Ironwood, Michigan" without the court's approval or the consent of the other parent. *Id*. The agency stated that the bill's rationale was to address the belief that, "in situations in which parents have dual legal custody, both parents' homes should be designated as the child's legal residence, and changing the child's legal residence should be subject to a restriction based on a reasonable and consistent distance." *Id*. 2000 PA 422 became effective on January 9, 2001 and was codified at MCL 722.31.

The new law provided that a child whose custody "is governed by court order has . . . a legal residence with each parent" and that a parent cannot change the child's legal residence "to a location that is more than 100 miles from the child's legal residence . . . ." MCL 722.31(1). A parent could, however, change the child's residence to a location that was more than 100 miles from the current residence if the parent obtained permission from the court or the other parent. MCL 722.31(2). The Legislature further provided that, when considering a motion for permission to change a child's domicile, the court must consider a series of factors that were in part derived from the *D'Onofrio* factors. See

[1] We have cited the bill analysis for background purposes and not as an aid to determining the Legislature's intent. See *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587 n 7; 624 NW2d 180 (2001).

MCL 722.31(4). Finally, the Legislature provided that this new section did not apply to orders that granted one parent sole legal custody—that is, MCL 722.31 only applied if the custody order provided for joint legal custody. MCL 722.31(2).

It is well settled that the common law remains in force until modified and that courts will not lightly presume a legislative intent to abrogate or modify the common law. *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010). Further, when the Legislature does exercise its right to modify the common law, it should speak in no uncertain terms. *Id.* Because MCL 722.31 and MCR 3.211(C)(1) can be construed harmoniously as complementary provisions, were we writing on a clean slate, we would conclude that trial courts must fully comply with both.[2] See *Dawe*, 485 Mich at 31-32 (noting that the statutory scheme at issue in that case was not so comprehensive that it suggested an intent to completely abrogate the common law and, for that reason, concluding that the common-law duties remained in addition to the new statutory duty). That is, we would conclude that, before a parent moves a child out of state, the parent must obtain the trial court's permission and the trial court must consider the *D'Onofrio* factors even if MCL 722.31 does not apply. Similarly, if MCR 3.211(C)(1) did not apply but MCL 722.31 did apply, the trial court would still have to conduct a hearing and consider the factors codified under MCL 722.31(4). But we are not writing on a clean slate.

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[2] We note that MCR 3.211(C)(1) also implicates our Supreme Court's authority to promulgate rules affecting court administration. See *McDougall v Schanz*, 461 Mich 15, 30-31; 597 NW2d 148 (1999). As already noted, a court that has issued an order governing the custody of a child continues to have jurisdiction over that child, and its duty to act in that child's best interests might be impaired if the child is removed from the state.

After our Legislature enacted MCL 722.31, this Court addressed the continuing validity of the common-law rules applicable to a motion to change domicile under MCR 3.211(C)(1) in *Spires v Bergman*, 276 Mich App 432; 741 NW2d 523 (2007). In that case, the defendant argued that the trial court erred by failing to make findings of fact with regard to the plaintiff's request to change the minor child's domicile from Michigan to Texas and by failing to consider the *D'Onofrio* factors as required under the common law. *Id.* at 436. The Court in *Spires* disagreed and held that the Legislature's decision to codify the *D'Onofrio* factors altered the common law. *Id.* at 437-438. Specifically, the Court held that the Legislature's decision to exempt parents with sole legal custody from the requirements of MCL 722.31 effectively eliminated the trial court's duty to consider the *D'Onofrio* factors under either MCL 722.31 or under MCR 3.211(C)(1). *Id.* at 438-440. Thus, even though a parent must still seek the trial court's permission under MCR 3.211(C)(1) before moving a child subject to a custody order out of this state, if MCL 722.31 does not apply, the trial court has no obligation to consider the *D'Onofrio* factors. *Id.* at 439-440. After the decision in *Spires*, another panel of this Court held that it was error for a trial court to consider the *D'Onofrio* factors, as codified under MCL 722.31(4), when considering whether to grant a parent's request to move the child out of this state under MCR 3.211(C)(1) because MCL 722.31 did not apply. See *Brausch v Brausch*, 283 Mich App 339, 350, 352-353; 770 NW2d 77 (2009). Accordingly, under the decisions in *Spires* and *Brausch*, if a parent with sole legal custody wishes to move a child subject to a custody order out of this state, MCL 722.31 does not apply and the trial court may not consider the *D'Onofrio* factors.

Nevertheless, the trial court must still exercise its discretion to grant or deny the request. See *Brausch*, 283 Mich App at 350.

We acknowledge that, after the decisions in *Spires* and *Brausch*, it is unclear how trial courts might properly exercise the discretion called for under MCR 3.211(C)(1). Indeed, those decisions appear to have rendered MCR 3.211(C)(1) nugatory; if MCL 722.31 does not apply, the trial court may not consider the *D'Onofrio* factors and, accordingly, must approve the request without further ado, which seems to contradict the notion that trial courts have the discretion to grant or deny requests to move a child whose custody is subject to a court order out of this state. In any event, it is now a matter for our Supreme Court to determine whether and to what extent MCR 3.211(C)(1) should have any continuing validity.

C. APPLICATION

The child at issue here was subject to a court order, but that order provided Brecht with sole legal custody. Accordingly, MCL 722.31 did not apply, see MCL 722.31(2), and the trial court was not required to consider the factors enumerated under MCL 722.31(4) in determining whether to grant the request. *Brausch*, 283 Mich App at 349-350; *Spires*, 276 Mich App at 438. Similarly, even though Brecht still had to obtain the court's permission before she could move the child out of state, because MCL 722.31 did not apply, the trial court could not make its determination in reliance on the *D'Onofrio* factors. *Brausch*, 283 Mich App at 350, 352-353. Rather, it had to grant her request as a matter of course. Therefore, the trial court erred when it determined that it was not in the child's interest to permit the move.

III. CONCLUSION

The trial court erred to the extent that it determined that MCL 722.31 applied to Brecht's request to move. And, although the trial court still had to determine whether Brecht should be permitted to move the child outside this state, see MCR 3.211(C)(1), it could not consider the *D'Onofrio* factors in determining whether to grant the request. *Brausch*, 283 Mich App at 352-353. Moreover, once it determined that MCL 722.31 did not apply, it should have granted Brecht's request. *Brausch*, 283 Mich App at 350, 352-353; *Spires*, 276 Mich App at 439-440 (noting that once the trial court determined that MCL 722.31 did not apply, it properly approved the parent's request to move the child out of state). For that reason, we vacate the order denying Brecht's request and remand for further proceedings consistent with this opinion.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Brecht may tax her costs. MCR 7.219(A).

SERVITTO, J., concurred with M. J. KELLY, J.

TALBOT, P.J. (*concurring*). I concur in the result only.

PEOPLE v AKHMEDOV

Docket Nos. 303129 and 305625. Submitted July 17, 2012, at Lansing. Decided July 26, 2012. Approved for publication September 11, 2012, at 9:05 a.m. Leave to appeal denied, 493 Mich 920.

Davrush Akhmedov was found guilty by a jury in the Ingham Circuit Court of two counts of delivery of less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(*iv*), and one count of delivery of 50 grams or more but less than 449 grams of a controlled substance, MCL 333.7401(2)(a)(*iii*). Defendant is a lawful United States' resident alien. Defendant arranged drug sales to undercover police officers after being introduced to them by his friend Mahmoud Elbast, a police informant. Defendant moved to dismiss the charges, arguing that he had been entrapped. The court, Joyce Draganchuk, J., denied the motion. Following his convictions, defendant was sentenced to 363 days in jail with 36 months' probation. The court departed downward from the sentencing guideline's range, concluding that there were substantial and compelling reasons to justify the departure because a sentence within the range would have resulted in defendant's automatic deportation without a prior cancellation of deportation hearing. The prosecution appealed the judgment of sentence (Docket No. 303129), defendant appealed his convictions (Docket No. 305625), and the Court of Appeals ordered the cases consolidated.

The Court of Appeals *held*:

1. A trial court must articulate substantial and compelling reasons on the record when imposing a sentence that is a departure from the guideline's recommended range. A departure is appropriate if the trial court believes the sentencing range is disproportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record. To deviate from the sentencing guidelines, the trial court must articulate substantial and compelling reasons that are objective and verifiable, keenly grab the court's attention, and are of considerable worth in deciding the terms of the sentence. Substantial and compelling reasons only exist in exceptional cases. Under 8 USC 1227(a)(2)(A)(*iii*) and 8 USC 1227(a)(2)(B)(*i*), an alien in and admitted to the United States shall be removed if the alien has

been convicted of certain crimes, including aggravated felonies and controlled substance violations. While a resident alien may apply for cancellation of his or her deportable status, such relief is only available if the alien has not been convicted of an aggravated felony. 8 USC 1229b(a). A state law controlled substance violation constitutes an aggravated felony for purposes of immigration law when the state law conviction could be punishable as a felony under the federal controlled substances act, 21 USC 801 *et seq*. Unless otherwise specified in a statute, a felony is a crime for which the maximum term of imprisonment authorized is more than one year. 8 USC 3559(a) clearly provides that the maximum term authorized refers to the maximum possible sentence contained in the statute, not to the maximum contained in the sentencing guidelines range or the actual sentence imposed by the trial court. The trial court abused its discretion by departing from the guidelines when imposing defendant's sentences. The court's stated departure reason—to protect defendant's ability to seek cancellation of deportation proceedings by keeping the sentence below one year—was premised on a misinterpretation of federal law. The length of the sentence imposed had no bearing on whether the conviction offenses were aggravated felonies for purposes of immigration law; rather the analysis was dependent on the maximum prison term authorized under the statutes for which he was convicted, MCL 333.7401(2)(a)(*iv*) and MCL 333.7401(2)(a)(*iii*). Accordingly, the trial court did not have substantial and compelling reasons to depart from the guidelines.

2. The entrapment defense is meant to deter abuse of authority by precluding criminal liability for acts that were instigated by the police and committed by those not predisposed to such acts. Entrapment occurs if the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances or the police engage in conduct so reprehensible that the court cannot tolerate it. Because a defendant may prove police entrapment solely through reprehensible conduct, police instigation is not a prerequisite to a claim of entrapment. Reprehensible conduct by an informant may be attributed to the police if a sufficient agency relationship exists between the informant and the police. However there is no entrapment when the police do not become involved with the informant until after the criminal transaction is complete. The trial court did not err by denying defendant's motion to dismiss

the charges on the basis of entrapment. While Mahmoud Elbast was a paid informant for the first transaction, the agency relationship did not exist at the time he groomed defendant during the weeks prior to the drug sales. Thus, Elbast's misconduct could not be attributed to the police because they had no control over him when he committed the acts. Defendant was also not induced by the police to commit the two additional drug transactions. The court's finding that Elbast was not an agent of the police for the two remaining transactions was not clearly erroneous because Elbast had no contact with the police after the first transaction. The police did not induce defendant to commit the crimes or engage in reprehensible behavior that would justify a finding of entrapment. Finally defendant initiated the final drug sale by contacting the undercover police officer and offering to provide larger quantities of cocaine. At that point the police merely gave defendant the opportunity to commit a crime, a circumstance which is insufficient to establish the entrapment defense,

Convictions affirmed, sentence vacated, and case remanded for resentencing.

IMMIGRATION LAW — DEPORTATION AND REMOVAL — GROUNDS — CRIMINAL ACTIVITY — AGGRAVATED FELONIES — CONTROLLED SUBSTANCE VIOLATIONS.

Under 8 USC 1227(a)(2)(A)(iii) and 8 USC 1227(a)(2)(B)(i), an alien in and admitted to the United States shall be removed if the alien has been convicted of certain crimes, including aggravated felonies and controlled substance violations; while a resident alien may apply for cancellation of his or her deportable status, such relief is only available if the alien has not been convicted of an aggravated felony; 8 USC 1229b(a); a state-law controlled substance violation constitutes an aggravated felony for purposes of immigration law when the state law conviction could be punishable as a felony under the federal controlled substances act, 21 USC 801 *et seq*.; unless otherwise specified in a statute, a felony is a crime for which the maximum term of imprisonment authorized is more than one year; 8 USC 3559(a) clearly provides that the maximum term authorized refers to the maximum possible sentence contained in the statute, not to the maximum contained in the sentencing guidelines range or the actual sentence imposed by the trial court.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Stuart J. Dunnings, III*, Prosecuting Attorney, and *Joseph B. Finnerty*, Appellate Division Chief, for the people.

State Appellate Defender (by *Desiree M. Ferguson*) for defendant.

Before: STEPHENS, P.J., and SAWYER and OWENS, JJ.

PER CURIAM. In these consolidated appeals, in Docket No. 305625, defendant appeals his convictions by a jury of two counts of delivery of less than 50 grams of a controlled substance, in violation of MCL 333.7401(2)(a)(*iv*) and one count of delivery of 50 grams or more but less than 449 grams of a controlled substance, in violation of MCL 333.7401(2)(a)(*iii*). In Docket No. 303129, the prosecutor appeals the judgment of sentence, which was a downward departure from the sentencing guidelines. We affirm defendant's convictions, but vacate the judgment of sentence and remand for resentencing.

I. BACKGROUND

Defendant is a lawful resident alien of Turkish heritage who moved to the United States from Russia to flee ethnic persecution. Although the sentencing guidelines recommended a prison term of 51 to 85 months, the trial court departed downward from the guidelines and sentenced defendant to 363 days in jail with 36 months probation. The court found that defendant would have been automatically deported without a cancellation of deportation hearing if he was sentenced to more than 363 days in jail for his crimes.

Defendant testified that he had a difficult time making friends because he could not speak English, but he was able to befriend Mahmoud Elbast, aka "Moe", who was a police informant who arranged drug sales to undercover police officers. Defendant reported that Moe was a close friend. He claimed that Moe told him that they could go to parties and meet girls for sex if he had

drugs. Moe called defendant daily to pressure him into locating a drug supplier. Defendant reported that after he agreed to locate a drug supplier and deal drugs, Moe set him up to deal drugs to undercover police officers. Defendant's convictions were the result of three separate drug deals with the undercover police officers.

II. SENTENCING DEPARTURE

The prosecutor argues that the trial court erroneously departed downward from the sentencing guidelines because the court's stated reason was not a substantial and compelling reason sufficient to justify the court's departure. We agree.

A sentence imposed within the sentencing range will be affirmed by this Court; however, a trial court must articulate substantial and compelling reasons on the record when departing from the guidelines if the court believes the sentencing range is "[dis]proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record." *People v Babcock*, 469 Mich 247, 255-256, 262; 666 NW2d 231 (2003); see also MCL 769.34(3).

> [T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. [*Babcock*, 469 Mich at 264-265 (quotations marks and citations omitted).]

The sentencing court must explain why its chosen sentence "is proportionate to the seriousness of the

defendant's conduct and his criminal history because, if it is not, the trial court's departure is necessarily not justified by a substantial and compelling reason." *Id.* at 264; see also *People v Smith*, 482 Mich 292, 301; 754 NW2d 284 (2008) (discussing facts present in the case that justified the trial court's departure from the recommended minimum sentence range).

To deviate from the sentencing guidelines, the trial court must articulate substantial and compelling reasons that (1) are objective and verifiable, (2) keenly grab the court's attention, and (3) are of considerable worth in deciding the terms of the sentence. *Babcock*, 469 Mich at 257. Substantial and compelling reasons justifying a departure exist only in exceptional cases. *Id.*

Here, the trial court explicitly stated that its sole reason for departing from the guidelines was to protect defendant's ability to seek cancellation of deportation proceedings, which would have resulted in both permanent exile from this country and permanent separation from his immediate and extended family.[1] We agree with the prosecutor that the trial court lacked substantial and compelling reasons to depart from the guidelines because the court's stated reason was premised on a misinterpretation of federal law. 8 USC 1227(a) provides that "[a]ny alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens." An alien is deportable if he or she is convicted of certain crimes, including aggravated felonies and controlled substance violations (excluding a single offense for possession of less than 30 grams of marijuana). 8 USC

[1] Although defendant presents other reasons on appeal to depart from the guidelines, the trial court did not rely upon these reasons in making its departure.

1227(a)(2)(A)(iii); 8 USC 1227(a)(2)(B)(i). While a resident alien may apply for cancellation of his or her deportable status, the alien is only eligible for such relief if the alien has not been convicted of an "aggravated felony." 8 USC 1229b(a). A state law controlled substance violation only constitutes an "aggravated felony" for purposes of immigration law when the state law conviction could be punishable as a felony under the federal Controlled Substances Act, 21 USC 801 *et seq*. *Lopez v Gonzales*, 549 US 47, 52-53, 60; 127 S Ct 625, 166 L Ed 2d 462 (2006). "A felony is a crime for which the 'maximum term of imprisonment authorized' is 'more than one year,' " unless otherwise specified in the statute. *Carachuri-Rosendo v Holder*, 560 US ___; 130 S Ct 2577, 2581; 177 L Ed 2d 68 (2010), quoting 18 USC 3559(a).

The trial court interpreted the phrase in 18 USC 3559(a), "maximum term of imprisonment authorized," as applying to the particular sentencing terms imposed by the trial court. The court mistakenly reasoned that defendant's conviction would not qualify as a felony under federal law if defendant were sentenced to less than one year in prison for his crimes. This interpretation runs contrary to the clear statutory language of 18 USC 3559(a). The " 'maximum' term of imprisonment authorized' " refers to the maximum possible sentence contained in the statute, not the maximum contained in the sentencing guidelines range or the actual sentence imposed by the trial court. *United States v Rodriquez*, 553 US 377, 391-392; 128 S Ct 1783; 170 L Ed 2d 719 (2008). The trial court's decision to depart from the guidelines actually had no effect on whether defendant's conviction would qualify as an "aggravated felony" under federal immigration law. Therefore, the trial court did not have substantial and compelling reasons for making

the downward departure. Accordingly, this Court vacates defendant's judgment of sentence and remands for resentencing.

III. ENTRAPMENT

Defendant argues that the trial court erred by denying his motion to dismiss because the record established that he was entrapped into committing the three drug crimes. We disagree. This Court has adopted the following standard of review when evaluating a claim of entrapment:

> Whether entrapment occurred is determined by considering the facts of each case and is a question of law for this Court to decide de novo. The trial court must make specific findings regarding entrapment, and this Court reviews its findings under the clearly erroneous standard. The findings are clearly erroneous if this Court is left with a firm conviction that a mistake was made. [*People v Fyda*, 288 Mich App 446, 456; 793 NW2d 712 (2010) (citations omitted).]

Entrapment is a criminal defense, and the defendant bears the burden of establishing entrapment by a preponderance of evidence. *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002). The purpose of this defense is to deter abuse of authority by precluding criminal liability for acts that were instigated by the police and committed by those not predisposed to such acts. *People v Juillet*, 439 Mich 34, 52; 475 NW2d 786 (1991). However, the police do not engage in entrapment merely by providing a defendant with the opportunity to commit a crime or by assisting an ongoing criminal conspiracy. *Id.* at 52-53. Michigan has adopted a modified objective test when analyzing entrapment, looking primarily at police conduct but also requiring the court to consider "the circumstances of the defen-

dant to determine whether the police conduct would induce a similarly situated person, with an otherwise law-abiding disposition, to commit the charged crime." *Id.* at 55. This includes consideration of any potential vulnerabilities of the defendant that the police may have exploited to induce the criminal acts. *Id.*

"Entrapment occurs if (1) the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances or (2) the police engage in conduct so reprehensible that the court cannot tolerate it." *Fyda*, 288 Mich App at 456. This Court must consider several factors in determining whether a defendant was impermissibly induced by the police to commit criminal activity, including (1) whether the police appealed to the defendant based on friendship, (2) whether the defendant had been known to commit the charged crime, (3) whether there was a time lapse between the investigation and the arrest, (4) whether there was an inducement that would make the crime unusually attractive to a law-abiding citizen, (5) whether excessive consideration was offered to the defendant, (6) whether the police guaranteed that the acts were not illegal, (7) whether the government pressured the defendant to commit the crime, (8) whether sexual favors were offered to the defendant, (9) whether the defendant was threatened with arrest unless he or she complied, (10) whether the government acted to escalate the defendant's criminal culpability, (11) whether the police had control over the informant, and (12) whether the investigation targeted the defendant. *Johnson*, 466 Mich at 498-499. Even if the police initially entrapped a defendant into committing a crime, "[i]nitial entrapment does not immunize a defendant from criminal liability for subsequent transactions that he readily and willingly undertook." *Id.* at 505.

Because a defendant may prove police entrapment solely through reprehensible conduct, police instigation is not a prerequisite to a claim of entrapment. *Fyda*, 288 Mich App at 456. Reprehensible conduct by an informant may be attributed to the police if a sufficient agency relationship exists between the informant and the police. *Juillet*, 439 Mich at 69. However, police do not commit entrapment when they do not become involved with the informant until after the criminal transaction is complete. *People v LaPlaunt*, 217 Mich App 733, 737-738; 552 NW2d 692 (1996).

We evaluate each of the three transactions separately to determine whether defendant was entrapped by police. Regarding the first transaction, we find that the record sufficiently establishes that defendant was not entrapped by the police. The court found that Moe was a paid informant for the first transaction. Moe's prior coaching of defendant may not be attributed to the police because the police only became involved with Moe on the same day of the first transaction. The purpose of the entrapment defense is to deter police misconduct, not the misconduct of uninvolved third parties. The agency relationship between Moe and the police did not exist at the time Moe groomed defendant during the weeks prior to the drug sales. Thus, Moe's misconduct could not be attributed to the police, because they had no control over him when he committed his reprehensible acts. Aside from Moe's misbehavior, defendant presented no other evidence that he had been entrapped by the police during this first transaction. Accordingly, the trial court correctly concluded that defendant failed to prove entrapment by a preponderance of evidence.

The record also establishes that defendant was not entrapped by the police during the second transaction.

In light of the fact that Moe and the police had no further contact after the first transaction, the trial court's finding that Moe was not an agent of the police for the second and third transactions was not clearly erroneous. Moe's repetitive appeals to defendant's friendship during the second and third transactions occurred after Moe ceased acting as a police informant. Looking solely to the conduct of the police, it is clear that female undercover officer Jill Kraczon gave no indication to defendant that she was going to start a personal or sexual relationship with him. Kraczon specifically refused to drive around with him, did not flirt with him, and only briefly spoke with him for less than three minutes during this transaction. Her phone calls and text messages only pertained to arranging the drug transactions. She gave him no indication that she would invite him to parties or introduce him to other women who would have sex with him. The police neither induced defendant into committing the crimes, nor engaged in reprehensible behavior that would justify a finding of entrapment. Accordingly, defendant failed to establish by a preponderance of evidence that he was entrapped into committing the second offense.

Likewise, defendant was not induced to commit the third transaction, and the police did not commit any reprehensible conduct. For this transaction, defendant initiated the drug sale by contacting Kraczon and offering to provide larger quantities of cocaine. Accordingly, defendant was not pressured or coerced into either selling drugs or escalating the amounts sold. Defendant's acts to conceal the drugs, change sale locations, and flee from the police all evince knowledge and awareness of the criminality of his actions. By this time, the police were clearly aware of defendant's drug-dealing activities, and their investigation was reasonably directed at these activities. In these circum-

stances, the police merely gave defendant the opportunity to commit a crime, which is insufficient to establish the entrapment defense. Therefore, the trial court did not err by refusing to dismiss this charge on the grounds of entrapment.

Affirmed as to defendant's convictions, but the sentence is vacated and remanded for resentencing.

STEPHENS, P.J., and SAWYER and OWENS, JJ., concurred.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered June 14, 2012:

STAND UP FOR DEMOCRACY v SECRETARY OF STATE, Docket No. 310047. Reported at 297 Mich App 45. The Court orders that a special panel shall not be convened pursuant to MCR 7.215(J) to resolve the conflict between this case and *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1; 654 NW2d 610 (2002).

Order Entered August 28, 2012:

JILEK v STOCKSON (ON REMAND), Docket No. 289488. The Court orders that the motion for reconsideration is granted, and this Court's opinion issued July 3, 2012, is hereby vacated. A new opinion is attached to this order.*

Order Entered November 15, 2012:

PEOPLE v FRANKLIN, Docket No. 296591. The Court orders that the July 3, 2012, opinion is hereby vacated, and a new opinion is attached.**

Order Entered July 31, 2012:

WHEELER ESTATE v DEPARTMENT OF TREASURY, HUZELLA v DEPARTMENT OF TREASURY, WRIGHT v DEPARTMENT OF TREASURY, AND WHEELER v DEPARTMENT OF TREASURY, Docket Nos. 302251, 302259, 302261, and 302262. The Court orders that the May 15, 2012, opinion is hereby vacated, and a new opinion is attached.***

Order Entered August 14, 2012:

PROTECT MI CONSTITUTION v SECRETARY OF STATE, Docket No. 311504. Reported at 297 Mich App 553. Reversed and mandamus order vacated, 492 Mich 860 (2012). The Court orders that the relief sought in the complaint for a writ of mandamus is granted. *Mich United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359, 365-366; 630 NW2d 297 (2001). Intervening defendant Citizens for More Michigan Jobs (CFMMJ) has submitted a petition for a proposed amendment to Const 1963, art 4, § 41 to be placed on the November 2012 general

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* New opinion reported at 297 Mich App 663—REPORTER.

** New opinion reported at 298 Mich App 539—REPORTER.

*** Original opinion unpublished; new opinion reported at 297 Mich App 411—REPORTER.

election ballot. Const 1963, art 4, § 25 provides that a law may not be revised, altered, or amended without a republishing of the affected statutory language. Because the proposed constitutional amendment would revise and alter the Michigan Gaming Control and Revenue Act, MCL 432.201 *et seq*., article 4, § 25 applies to the CFMMJ petition. The petition does not republish the statutory language and therefore does not satisfy the constitutional prerequisite for acceptance. The Secretary of State is ordered and directed to stop the canvass, to reject the CFMMJ petition, and not to allow the proposal to be placed on the ballot. *Leininger v Secretary of State*, 316 Mich 644; 26 NW2d 348 (1947); *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273; 761 NW2d 210, aff'd in part 482 Mich 960 (2008).

RONAYNE KRAUSE, J., partially dissented and partially concurred for the reasons stated in her opinion.

Order Entered August 20, 2012:

PEOPLE V KING, Docket No. 301793. Reported at 297 Mich App 465. The Court orders that a special panel shall not be convened pursuant to MCR 7.215(J) to resolve the conflict between this case and *People v Brantley*, 296 Mich App 546; ___ NW2d ___ (2012).

Order Entered September 20, 2012:

LOUTTS V LOUTTS, Docket No. 297427. The Court orders that the September 4, 2012, opinion is hereby vacated, and a new opinion is attached.****

**** New opinion reported at 298 Mich App 21—REPORTER.

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1. The prerequisites for a class action are (1) a class so numerous that joinder of all members is impracticable, (2) questions of law or fact common to the members of the class that predominate over questions affecting only individual members, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately assert and protect the interests of the class, and (5) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice (MCR 3.501[A][1]). *Smith v Dep't of Human Services Director*, 297 Mich App 148.

FIDUCIARY RELATIONSHIPS

2. A fiduciary relationship is a relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship; fiduciary relationships usually arise (1) when one person places trust in the faithful integrity of another who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has tradi-

tionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer. *Calhoun County v Blue Cross Blue Shield Michigan*, 297 Mich App 1.

SALES REPRESENTATIVES COMMISSION ACT

3. Under the sales representatives commission act (SRCA), a "sales representative" is a person who contracts with or is employed by a principal for the solicitation of orders or sale of goods and is paid, in whole or in part, by commission; pursuant to the common meanings of the terms, "goods" are articles of trade or merchandise and an "order" is a direction or commission to make, provide, or furnish something; to constitute a sales transaction under the SRCA, no transfer of title is required; rather, a lease of a good constitutes an order of the good so as to render the sales representative in the transaction subject to the SRCA (MCL 600.2961). *Radina v Wieland Sales, Inc*, 297 Mich App 369.

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1. Regardless of the specific basis of a trial court's ruling on a motion for summary disposition, whenever the effect is to deny a defendant's claim of governmental immunity the decision is, in fact, an order denying governmental immunity that is reviewable under MCR 7.202(6)(a)(v) and MCR 7.203(A). *Seldon v Suburban Mobility Auth for Regional Transportation*, 297 Mich App 427.

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1. To determine what constitutes a reasonable attorney fee the court should first determine the fee customarily charged in the locality for similar legal services by using reliable surveys or other credible evidence of the legal market, multiplied by the reasonable number of hours expended in the case; once a reasonable fee is calculated the additional factors outlined in *Smith v Khouri*, 481 Mich 519 (2008) should be

considered to determine if the fee should be adjusted up or down. *Van Elslander v Thomas Sebold & Associates, Inc*, 297 Mich App 204.

CASE EVALUATION SANCTIONS

2. Under MCR 2.403(O)(6) attorney fees and actual costs may be awarded as case evaluation sanctions so that the burden of the litigation's actual costs is imposed on the party who insists on trial by rejecting a mediation award; actual costs are those costs taxable in any civil action and a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by rejection of the case evaluation; there must be a causal nexus between the services performed by the attorney and the particular party's rejection of the case evaluation; sanctions should be imposed on a rejecting party under MCR 2.403(O)(1) on the basis of the ultimate verdict that the parties are left with after appellate review is complete. *Van Elslander v Thomas Sebold & Associates, Inc*, 297 Mich App 204.

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3. If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing; excessive, redundant or otherwise unnecessary hours, regardless of an attorney's skill, reputation or experience, must be excluded when calculating what constitutes hours reasonably expended for purposes of an award of attorney fees. *Van Elslander v Thomas Sebold & Associates, Inc*, 297 Mich App 204.

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2. Courts determine whether a governmental impairment of a contract violates the Contract Clause by determining whether the government has shown that it did not consider impairing the contract on par with other policy alternatives, impose a drastic impairment when an evident and more moderate course would serve its purpose equally well, or act unreasonably in light of the surrounding circumstances; the courts generally are to determine whether the particular impairment is necessary to the public good (US Const, art I, § 10; Const 1963, art 1, § 10). *AFT Michigan v State of Michigan*, 297 Mich App 597.

3. Modest, temporary impairments of governmental contracts may be imposed as a matter of last resort to address a fiscal emergency; the circumstances must be extraordinary and the degree of the impairment with regard to its amount and its duration are central questions to be answered in determining whether the impairment passes constitutional muster (US Const, art I, § 10; Const 1963, art 1, § 10). *AFT Michigan v State of Michigan*, 297 Mich App 597.

EQUAL PROTECTION

4. Michigan has adopted a two-pronged test to determine whether a particular prosecution violates the Equal Protection Clause: first it must be shown that the defendants were singled out for prosecution while others similarly situated were not prosecuted for the same conduct, second, it must be established that the discriminatory selection in prosecution was based on an

impermissible ground such as race, sex, religion, or the exercise of a fundamental right. *In re Tiemann*, 297 Mich App 250.

EX POST FACTO LAWS

5. A statute violates ex post facto principles if it (1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence; formerly, a trial court was authorized to order a felon to pay a $60 crime victim's assessment fee under the Crime Victim's Rights Act (CVRA); effective December 16, 2010, the act was amended to increase the statutory assessment from $60 to $130; an assessment under the CVRA does not constitute punishment; thus, retroactive application of the fee increase does not violate the constitutional prohibition against ex post facto laws (US Const, art 1, § 10, cl 1; Const 1963, art 1, § 10, Const 1963, art 1, § 24[3]; MCL 780.905[1][a]). *People v Earl*, 297 Mich App 104.

INEFFECTIVE ASSISTANCE OF COUNSEL

6. A new trial may be granted on the basis of ineffective assistance of counsel if the defendant establishes (1) that the trial counsel's performance fell below an objective standard of reasonableness, and (2) that but for the counsel's deficient performance, a different result would have been reasonably probable; an appellate court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight; decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy; the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense; the failure to make an adequate investigation constitutes ineffective assistance of counsel if it undermines confidence in the trial's outcome. *People v Russell*, 297 Mich App 707.

RIGHT TO PUBLIC TRIAL

7. A defendant has the right to a public trial, which includes the right to have the courtroom open to the public during jury voir dire; the effect of a partial closure of trial does not reach the level of a total closure and only a substantial, rather than a compelling reason for the closure is required. *People v Russell*, 297 Mich App 707.

SEPARATION OF POWERS

8. Under the 1963 Michigan Constitution, the powers of government are divided into three branches: legislative, executive, and judicial; no person exercising the powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in the Constitution; an administrative agency that acts outside its statutory boundaries usurps the role of the Legislature; the Department of Human Services (DHS) is statutorily authorized to add eligibility criteria for the receipt of Family Independence Program benefits that are not required for federal or state funding but are necessary to accomplish the goals of the program; one of the goals of the program is to achieve its efficient, fair, and cost-effective administration; accordingly, the DHS is statutorily authorized to add eligibility criteria that promote the program's efficient, fair, and cost-effective administration and may do so without violating the separation of powers doctrine (Const 1963, art 3, § 2; MCL 400.57a[3][a], MCL 400.57b[1][f]). *Smith v Dep't of Human Services Director*, 297 Mich App 148.

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9. The constitutionality of a statute must be examined in light of the particular facts at hand without concern for the hypothetical rights of others when a defendant's challenge of a statute as being impermissibly vague does not implicate First Amendment freedoms; the proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in the case. *In re Tiemann*, 297 Mich App 250.

TAKING CLAUSE

10. MCL 38.1343e, which requires that public school districts and other reporting units withhold three percent of each employees' wages and remit the amount to the Michigan Public School Employees Retirement System as employer contributions to the trust that funds retiree health-care benefits, violates the constitutional protections against the impairment of contracts by the state, the taking of private property by the government without just compensation, and substantive due process (US Const, art I, § 10; US Const, Ams V and XIV;

Const 1963, art 1, § 10; Const 1963, art 1, § 17; Const 1963, art 10, § 2). *AFT Michigan v State of Michigan*, 297 Mich App 597.

11. A Fifth Amendment taking occurs, requiring the government to pay just compensation, when the government directly seizes property in which a person has a property interest; a violation per se of the Taking Clause occurs when the government does not merely impose an assessment or require payment of an amount of money without consideration but instead asserts ownership of a specific and identifiable parcel of money (US Const, Am V; Const 1963, art 10, § 2). *AFT Michigan v State of Michigan*, 297 Mich App 597.

CONTRACTS

Breach of Contracts

1. A court may not ignore a contract's plain and unambiguous terms on the basis that they are unreasonable; forfeiture is that which is lost, or the right to which is alienated, by a breach of contract and terminates an existing contract without restitution; breach of a covenant does not justify the cancellation of an entire contract unless there is a provision in a contract clearly and expressly allowing forfeiture; only recognized traditional contract defenses, like duress, waiver, estoppel, fraud, and unconscionability may be used to avoid the enforcement of a legal forfeiture clause; procedural and substantive unconscionability must both be present for a contract or a contract provision to be found unconscionable; procedural unconscionability occurs when the weaker party was not free to accept or reject the disputed contract term; a contract provision is substantively unconscionable when its inequity is so extreme that it shocks the conscience. *Majestic Golf, LLC v Lake Walden Country Club, Inc*, 297 Mich App 305.

Elements of Contracts

2. The elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation; for a contract to be enforceable, the parties must have a meeting of the minds on all the essential terms when judged by an objective standard

based on the parties' express words and visible acts. *Calhoun County v Blue Cross Blue Shield Michigan*, 297 Mich App 1.

INDEFINITENESS

3. A contract will not fail for indefiniteness when the promises and performances of each party are set forth with reasonable certainty even if some terms are incomplete or indefinite as long as the parties intended to be bound by the agreement, particularly if one of the parties has rendered partial or full performance; if the price is indefinite, for example, the purchaser may be required to pay and the seller required to accept a reasonable price, and if the time of performance is indefinite, performance may be required to be rendered within a reasonable time; a contractual fee may be enforceable despite the contract's failure to specify its dollar amount if the promises and performances to be rendered by each party were set forth with reasonable certainty. *Calhoun County v Blue Cross Blue Shield Michigan*, 297 Mich App 1.

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MARIJUANA

1. A qualifying patient who has been issued and possesses a registry identification card is immune from arrest, prosecution, or penalty under the provisions of the Michigan Medical Marihuana Act for the possession or use of marijuana where the patient possesses less than 2.5 ounces of usable marijuana and the patient's possession and use of the marijuana was the medical use of marijuana as defined in the act; the immunity from arrest, prosecution, or penalty is applicable separately under each circumstance, therefore, a person may fail to qualify for immunity from arrest but still be entitled to immunity from prosecution or penalty; the act's use of the term "possesses" requires the patient to presently

possess a card in order to qualify for immunity; a patient possess a card for purposes of immunity from arrest only when the patient's card is reasonably accessible at the location of the patient's possession or use of marijuana, and a patient possesses a card for purposes of immunity from prosecution only when the card is reasonably accessible at the location of his or her prosecution (MCL 333.26423[e], [h], [i], and [j]; MCL 333.26424[a]). *People v Nicholson*, 297 Mich App 191.

CONVEYANCES—*See*

DIVORCE 2

CORPORATIONS—*See*

TAXATION 5

COSTS

See, also, ATTORNEY FEES 1, 2

INSURANCE 4

EXPERT WITNESS FEES

1. MCL 600.2164(1) authorizes a trial court to award expert witness fees as an element of taxable costs; an expert witness must testify regarding matters of opinion, not to the established facts or deductions of science or other specific facts; expert witnesses are not automatically compensated for all services rendered; they are properly compensated for court time, the time required to prepare for their testimony and their travel expenses; expert witnesses may not be compensated for educating counsel about expert appraisals, strategy sessions, or analyzing the opposing party's position; under MCR 2.302(B)(4)(c)(i), the trial court must direct the party obtaining deposition testimony from an expert to pay him or her a reasonable fee, unless a manifest injustice would result from the payment; if an expert witness's trial preparation requires the work of an assistant, that amount is taxable if the aid provided is directed to preparing the expert witness to express an opinion (MCL 600.2405[1]; MCL 600.2552[1]; MCL 600.2552[5]). *Van Elslander v Thomas Sebold & Associates, Inc*, 297 Mich App 204.

COURT OF APPEALS—*See*

MANDAMUS 1

COURTS

See, also, APPEAL 2

VENUE

1. A validly entered order for change of venue divests the ordering court of its jurisdiction and transfers that jurisdiction to the designated venue when it is signed; although the transferor court has residual jurisdiction to evaluate the costs to be imposed for the transfer, any subsequent motions in the case, including one for reconsideration of the order changing venue, must be made in the transferee court; a transferor court may, however, reserve jurisdiction over motions for rehearing or reconsideration of orders changing venue by making the transfer effective after the period specified by MCR 2.119(F) for filing and serving motions for rehearing or reconsideration (MCL 600.1651). *Frankfurth v Detroit Medical Center*, 297 Mich App 654.

COVERAGE EXCLUSIONS UNDER NO-FAULT ACT—*See*

INSURANCE 5

CRIME VICTIM'S ASSESSMENT FEES—*See*

CONSTITUTIONAL LAW 5

CRIME VICTIMS—*See*

SENTENCES 5, SETTLEMENTS 1, 2

CRIMINAL ACTIVITY AS GROUND FOR DEPORTATION—*See*

IMMIGRATION 1

CRIMINAL LAW

See, also, CONTROLLED SUBSTANCES 1

SEARCHES AND SEIZURES 1

STATUTES 3, 5

CONSTITUTIONAL LAW

1. The Sex Offenders Registration Act is regulatory and does not impose punishment; the act does not implicate a liberty or property interest and does not implicate due process rights; the act is not a criminal statute that

concerns a criminal prosecution to which the Confrontation Clause applies (MCL 28.721 *et seq*.). *In re Tiemann*, 297 Mich App 250.

2. The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, but that right is subject to reasonable restrictions; Michigan's Rules of Evidence do not infringe on a defendant's constitutional right to present a defense unless they are arbitrary or disproportionate to the purposes they are designed to serve (US Const, Am VI, US Const, Am XIV). *People v King*, 297 Mich App 465.

CRIMINAL SEXUAL CONDUCT

3. The purpose of the provision of the third-degree criminal sexual conduct statute prohibiting acts of sexual penetration with another person when that other person is at least 13 years of age and under 16 years of age is the protection of the minor victim; the age of the offender is not a relevant concern; there is no public policy bar to the prosecution of one child who engages in sexual conduct with another child when both are within the same protected age group (MCL 750.520d[1][a]). *In re Tiemann*, 297 Mich App 250.

EVIDENCE

4. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity with it on a particular occasion, except evidence of a pertinent trait of character offered by an accused; an accused has an absolute right to introduce evidence of his or her character to prove that he or she could not have committed the crime, but the preserved trial error of excluding proposed character evidence is not grounds for reversal if, after an examination of the entire cause, it does not affirmatively appear that it is more probable than not that the error was outcome determinative (MRE 404[a][1]). *People v King*, 297 Mich App 465.

CRIMINAL SEXUAL CONDUCT—*See*

CRIMINAL LAW 3

CUSTODY OF CHILDREN—*See*

PARENT AND CHILD 1, 2, 6

DEEDS—*See*

DIVORCE 2

DEFENSES—*See*
CONTRACTS 1
CONTROLLED SUBSTANCES 1
CRIMINAL LAW 2
STATUTES 3
DEFICIENCIES—*See*
TAXATION 4
DELEGATION OF LAW ENFORCEMENT POWERS—*See*
SHERIFFS AND CONSTABLES 1
DENIALS OF LIABILITY—*See*
INSURANCE 1
DEPARTMENT OF CORRECTIONS—*See*
SETTLEMENTS 1, 2
DEPARTMENT OF HUMAN SERVICES—*See*
ADMINISTRATIVE LAW 1
CONSTITUTIONAL LAW 8
PARENT AND CHILD 8
DEPORTATION AND REMOVAL—*See*
IMMIGRATION 1
DEPUTY SHERIFFS—*See*
SHERIFFS AND CONSTABLES 1, 2
DIRECT CONFLICT WITH ORDINANCES—*See*
STATUTES 5
DISABLED PASSENGERS—*See*
GOVERNMENTAL IMMUNITY 2
PUBLIC TRANSPORTATION 2, 3, 4
DISCOVERY—*See*
PRETRIAL PROCEDURE 1
DISTRIBUTION OF PRISONERS' SETTLEMENT PROCEEDS—*See*
SETTLEMENTS 1, 2

DIVORCE

SETTLEMENT AGREEMENTS

1. Under MCR 3.216(A)(1), all domestic relations cases, as defined in MCL 552.502(l), now MCL 552.502(m), are subject to mediation under MCR 3.216; MCR 3.216(H)(7) requires that for the terms of a settlement agreement to be binding, the terms of that settlement agreement must be reduced to a signed writing by the parties or acknowledged by the parties on an audio recording; domestic relations matters include circuit court proceedings in which spousal support is in issue and that arise out of litigation under a statute of this state, including but not limited to MCL 552.1 to 552.45; a divorce judgment settlement agreement that addresses spousal support and property distribution is a domestic relations case for purposes of MCR 3.216(A). *Vittiglio v Vittiglio*, 297 Mich App 391.
2. The statute of frauds, MCL 566.106, requires that the conveyance of an interest in land must be by a deed or a conveyance in writing or by act or operation of law; MCR 3.216(7) provides that the terms of a domestic relations settlement agreement reached by mediation are binding if (1) reduced to a signed writing, or (2) acknowledged by the parties on an audio or video recording; a property settlement in a domestic relations matter that is acknowledged by the parties on the record in accordance with MCR 3.216(7) does not violate the statute of frauds because the settlement occurred by act or operation of law pursuant to the court rule. *Vittiglio v Vittiglio*, 297 Mich App 391.

DOCUMENTS SUBJECT TO VERIFICATION—*See*

SANCTIONS 2

DOMESTIC RELATIONS—*See*

DIVORCE 1, 2

PARENT AND CHILD 3, 4, 5, 6

DOMICILE OF CHILD—*See*

PARENT AND CHILD 1

DUE PROCESS—*See*

CONSTITUTIONAL LAW 10

CRIMINAL LAW 1

EFFECTIVE ASSISTANCE OF COUNSEL—*See*

CONSTITUTIONAL LAW 6

ELECTION OFFICIALS—*See*

MANDAMUS 1

ELECTION TO PAY USE TAX ON LEASE RECEIPTS—*See*

TAXATION 6

ELECTIONS

PETITIONS FOR BALLOT QUESTIONS

1. *Stand Up for Democracy v Secretary of State*, 297 Mich App 45.

ELECTRIC UTILITIES—*See*

PUBLIC UTILITIES 1, 2

ELEMENTS OF CONTRACTS—*See*

CONTRACTS 2

EMPLOYMENT—*See*

SHERIFFS AND CONSTABLES 2

EMPLOYMENT RELATIONS—*See*

LABOR RELATIONS 1, 2

ENFORCEABILITY OF INDEFINITE CONTRACTS—*See*

CONTRACTS 3

ENFORCEMENT OF STATUTES—*See*

STATUTES 1

EQUAL PROTECTION—*See*

CONSTITUTIONAL LAW 4

EVIDENCE—*See*

CRIMINAL LAW 2, 4

EVIDENTIARY HEARING—*See*

ATTORNEY FEES 3

EX POST FACTO LAWS—*See*

CONSTITUTIONAL LAW 5

EXPERT WITNESS FEES—*See*
COSTS 1

FACTORS FOR CHANGING CHILD'S DOMICILE—*See*
PARENT AND CHILD 2

FAILURE TO SPECIFY CERTAIN CONTRACT TERMS—*See*
CONTRACTS 3

FAMILY LAW—*See*
PARENT AND CHILD 3, 4, 5, 6

FEDERAL DEPENDENCY TAX EXEMPTIONS—*See*
PARENT AND CHILD 5

FEDERAL PREEMPTION—*See*
STATUTES 2, 3

FEE INCREASES AS EX POST FACTO LAWS—*See*
CONSTITUTIONAL LAW 5

FIDUCIARY RELATIONSHIPS—*See*
ACTIONS 2

FIFTH AMENDMENT—*See*
CONSTITUTIONAL LAW 10, 11

FINAL JUDGMENTS—*See*
PARENT AND CHILD 6

FINAL ORDERS—*See*
APPEAL 1
PARENT AND CHILD 6

FIRE INSURANCE—*See*
INSURANCE 2, 3

FONT DEFINED—*See*
ELECTIONS 1

FORECLOSURE BY ADVERTISEMENT—*See*
MORTGAGES 1

FORECLOSURES—*See*

MORTGAGES 2

FORFEITURE—*See*

CONTRACTS 1

FORMAL DENIALS OF LIABILITY UNDER FIRE INSURANCE POLICIES—*See*

INSURANCE 2, 3

FORMS FOR PETITIONS PRESCRIBED BY SECRETARY OF STATE—*See*

ELECTIONS 1

FOURTEENTH AMENDMENT—*See*

CONSTITUTIONAL LAW 10

CRIMINAL LAW 2

FUTILITY OF AMENDMENT—*See*

PLEADING 1

GAME

BEAR

1. *People v Levigne*, 297 Mich App 278.

GOODS DEFINED—*See*

ACTIONS 3

GOVERNMENTAL IMMUNITY

See, also, APPEAL 1

GROSS NEGLIGENCE

1. The phrase "the proximate cause" in MCL 691.1407(2)(c) requires that the governmental employee's grossly negligent conduct be the one most immediate, efficient, and direct cause preceding an injury. *Seldon v Suburban Mobility Auth for Regional Transportation*, 297 Mich App 427.

MOTOR VEHICLE EXCEPTION

2. The loading and unloading of passengers is an activity within the operation of a motor vehicle for purposes of the motor vehicle exception to governmental immunity; the failure to inform a passenger in a wheelchair that a shoulder restraint is available does not, without more,

constitute the operation of the motor vehicle (MCL 691.1405). *Seldon v Suburban Mobility Auth for Regional Transportation*, 297 Mich App 427.

GROSS NEGLIGENCE—*See*

GOVERNMENTAL IMMUNITY 1

GROUNDS FOR DEPORTATION—*See*

IMMIGRATION 1

HABITUAL-OFFENDER ENHANCEMENTS—*See*

SENTENCES 1

HANDICAPPED PASSENGERS—*See*

GOVERNMENTAL IMMUNITY 2

PUBLIC TRANSPORTATION 2, 3, 4

HARMFUL SUBSTANCES AS WEAPONS—*See*

SENTENCES 4

HEALTH-CARE BENEFITS—*See*

CONSTITUTIONAL LAW 10

HEARINGS—*See*

SANCTIONS 3

HUNTING BEAR—*See*

GAME 1

IMMEDIATE EFFECT—*See*

STATUTES 4

IMMIGRATION

DEPORTATION AND REMOVAL

1. Under 8 USC 1227(a)(2)(A)(iii) and 8 USC 1227(a)(2)(B)(i), an alien in and admitted to the United States shall be removed if the alien has been convicted of certain crimes, including aggravated felonies and controlled substance violations; while a resident alien may apply for cancellation of his or her deportable status, such relief is only available if the alien has not been convicted of an aggravated felony; 8 USC 1229b(a); a state-law controlled substance violation constitutes an aggravated

felony for purposes of immigration law when the state law conviction could be punishable as a felony under the federal controlled substances act, 21 USC 801 *et seq*.; unless otherwise specified in a statute, a felony is a crime for which the maximum term of imprisonment authorized is more than one year; 8 USC 3559(a) clearly provides that the maximum term authorized refers to the maximum possible sentence contained in the statute, not to the maximum contained in the sentencing guidelines range or the actual sentence imposed by the trial court. *People v Akhmedov*, 297 Mich App 745.

IMMUNITY FROM ARREST, PROSECUTION, OR PENALTY—*See*

CONTROLLED SUBSTANCES 1

IMPAIRMENT OF CONTRACTS—*See*

CONSTITUTIONAL LAW 2, 3, 10

IMPASSES IN COLLECTIVE BARGAINING—*See*

LABOR RELATIONS 2

IMPUTED INCOME—*See*

PARENT AND CHILD 3

INADEQUATE INVESTIGATION AS INEFFECTIVE ASSISTANCE—*See*

CONSTITUTIONAL LAW 6

INCOME TAX—*See*

TAXATION 1, 2, 3, 4

INCREASED FEES OR PUNISHMENTS AS EX POST FACTO LAWS—*See*

CONSTITUTIONAL LAW 5

INDEFINITENESS—*See*

CONTRACTS 3

INEFFECTIVE ASSISTANCE OF COUNSEL—*See*

CONSTITUTIONAL LAW 6

INITIATIVE LAWS—*See*

CONSTITUTIONAL LAW 1

INJUNCTIONS

PRELIMINARY INJUNCTIONS

1. The purpose of a preliminary injunction is to preserve the status quo pending a final hearing regarding the parties' rights and the moving party must prove (1) the likelihood that the party will prevail on the merits, (2) the danger that the moving party will suffer an irreparable harm if the injunction is not issued, (3) the risk that the moving party would be harmed more by the absence of an injunction than the opposing party would be by granting the relief, and (4) the harm to the public interest if the injunction is issued; to meet the burden of establishing the existence of an irreparable harm when seeking a preliminary injunction, the moving party must demonstrate a particularized showing of irreparable harm with the injury being evaluated in light of the totality of the circumstances affecting, and the alternatives available to, the moving party. *Hammel v Speaker of the House of Representatives*, 297 Mich App 641.

INSURANCE

DENIALS OF LIABILITY

1. When an insurer denies a claim and then agrees to reopen it, the initial denial is effectively withdrawn. *Smitham v State Farm Fire & Casualty Co*, 297 Mich App 537.

FIRE INSURANCE

2. Michigan policies of fire insurance must specify that an action must be commenced within one year after the loss or within the time specified in the policy, whichever is longer, and that the time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability; policy language that conditions tolling on the formal denial of liability, however, is absolutely void (MCL 500.2833[1][q], MCL 500.2860). *Smitham v State Farm Fire & Casualty Co*, 297 Mich App 537.
3. Tolling may occur with respect to an action for underpayment of a claim for fire insurance proceeds, and an insured's awareness of the amount of a payment does not establish a formal denial of the claim; rather, to end the tolling period following a partial payment, the insurer must explicitly indicate that it is denying all liability in

excess of what it has paid (MCL 500.2833[1][q]). *Smitham v State Farm Fire & Casualty Co*, 297 Mich App 537.

NO-FAULT

4. *Gentris v State Farm Mutual Automobile Ins Co*, 297 Mich App 354.
5. Under the unlawful-taking exclusion of the no-fault automobile insurance act (MCL 500.3113[a]), a person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident the person was using a motor vehicle or motorcycle that he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle; determining the applicability of this statute involves two levels of inquiry: (1) determining whether the taking was unlawful, which entails ascertaining whether the injured individual seeking coverage took the vehicle or engaged in the taking of the vehicle, and (2) if the vehicle was taken unlawfully, determining whether the injured person reasonably believed that he or she was entitled to take and use the vehicle; if the taking was lawful, the unlawful-taking coverage exclusion does not apply; for a claimant to have taken a vehicle unlawfully, (1) the vehicle must have been taken, (2) the taking of the vehicle must have been unlawful, (3) it must have been the injured claimant who took the vehicle unlawfully, and (4) the injured person must therefore have both taken the vehicle and acted unlawfully in doing so; an unlawful taking under the coverage exclusion requires some action by the end user of the vehicle contrary to the Michigan Penal Code. *Rambin v Allstate Ins Co*, 297 Mich App 679.

INTERIM RATE INCREASES—*See*

PUBLIC UTILITIES 1

INTERNATIONAL BUSINESSES—*See*

TAXATION 2

INTERROGATORIES—*See*

PRETRIAL PROCEDURE 1

IRREPARABLE HARM—*See*

INJUNCTIONS 1

JOURNALS OF THE HOUSE AND SENATE—*See*

STATUTES 4

JUDGMENTS—*See*

DIVORCE 1

JURISDICTION—*See*

COURTS 1

JURISDICTION OF COURT OF APPEALS—*See*

MANDAMUS 1

PARENT AND CHILD 6

JUST COMPENSATION—*See*

CONSTITUTIONAL LAW 10, 11

JUVENILE OFFENDERS—*See*

CRIMINAL LAW 3

JUVENILE SENTENCES FOR PREDICATE FELONIES—*See*

SENTENCES 1

LABOR RELATIONS

PUBLIC EMPLOYMENT RELATIONS ACT

1. Public employment labor relations are governed by the public employment relations act (PERA), MCL 423.201 *et seq*.; following the expiration of a collective-bargaining agreement, PERA requires that a public employer bargain collectively and in good faith with respect to wages, hours, and other terms and conditions of employment that are mandatory subjects of bargaining; the primary obligation of the parties when negotiating a collective-bargaining agreement is to meet and confer in good faith by manifesting an attitude and conduct that will be conducive to reaching an agreement; if the parties have negotiated in good faith regarding mandatory subjects of bargaining, their duty under PERA has been met. *AFSCME Local 25 v Wayne County*, 297 Mich App 489.
2. Mandatory subjects of collective bargaining survive the expiration of a collective-bargaining agreement by operation of law until an impasse in negotiation occurs; before an impasse is reached, neither party may take unilateral action with respect to a manda-

tory subject of bargaining; the authority to unilaterally implement the last best offer when negotiations have reached an impasse is intrinsic to the duty to collectively bargain in good faith and is part of the negotiation process itself. *AFSCME Local 25 v Wayne County*, 297 Mich App 489.

LABOR UNIONS—*See*

ACTIONS 4

LAW ENFORCEMENT POWERS—*See*

SHERIFFS AND CONSTABLES 1

LEASES OF GOODS BY SALES REPRESENTATIVES—*See*

ACTIONS 3

LEGAL DUTIES—*See*

MANDAMUS 1

LEGAL RESIDENCE OF CHILD—*See*

PARENT AND CHILD 1

LEGISLATIVE JOURNALS—*See*

STATUTES 4

LESSORS OF TANGIBLE PERSONAL PROPERTY—*See*

TAXATION 6

LETTERS AS ANSWERS TO INTERROGATORIES—*See*

PRETRIAL PROCEDURE 1

LIMITATION OF ACTIONS—*See*

INSURANCE 2

LOSS OF PROMISSORY NOTE SECURED BY MORTGAGE—*See*

MORTGAGES 2

MANDAMUS

COURT OF APPEALS

1. *Protect Michigan Constitution v Secretary of State*, 297 Mich App 553.

MANDATORY REQUIREMENTS FOR REFERENDUM PETITIONS—*See*
ELECTIONS 1

MARIJUANA—*See*
CONTROLLED SUBSTANCES 1
SEARCHES AND SEIZURES 1
STATUTES 3, 5

MEDIATION—*See*
DIVORCE 1

MEDICAL MARIJUANA—*See*
CONTROLLED SUBSTANCES 1
SEARCHES AND SEIZURES 1
STATUTES 3, 5

MICHIGAN CHILD SUPPORT FORMULA—*See*
PARENT AND CHILD 3

MICHIGAN MEDICAL MARIHUANA ACT—*See*
CONTROLLED SUBSTANCES 1
SEARCHES AND SEIZURES 1
STATUTES 3, 5

MICHIGAN RULES OF EVIDENCE—*See*
CRIMINAL LAW 2

MINISTERIAL DECISIONS—*See*
MANDAMUS 1

MINORS—*See*
CRIMINAL LAW 3

MODIFICATION OF CHILD SUPPORT—*See*
PARENT AND CHILD 4, 5

MONEY AS OBJECT OF TAKING—*See*
CONSTITUTIONAL LAW 11

MORTGAGES

FORECLOSURE BY ADVERTISEMENT

1. *Richard v Schneiderman & Sherman, PC (On Remand)*, 297 Mich App 271.

FORECLOSURES

2. Following default, a mortgage may be foreclosed by advertisement if the document contains a power-of-sale clause; under MCL 600.3204(1) a party may foreclose a mortgage by advertisement if (1) a default in a condition of a mortgage occurs by which the power to sell becomes operative, (2) an action to recover the debt secured by the mortgage has not been instituted, (3) the mortgage containing the power-of-sale clause had been recorded, and (4) the party foreclosing the mortgage either owns the indebtedness or has an interest in the indebtedness; a mortgagee may foreclose on a mortgage without producing the note secured by the mortgage if the mortgagee produces a valid mortgage and power of sale; the mortgagee must give clear proof of the debtor's default and continuing debt obligation. [MCL 600.3201; MCL 3204(1).] *Sallie v Fifth Third Bank*, 297 Mich App 115.

MOTIONS AND ORDERS—*See*

APPEAL 1

MOTIONS FOR REHEARING OR RECONSIDERATION OF VENUE ORDERS—*See*

COURTS 1

MOTOR VEHICLE EXCEPTION—*See*

GOVERNMENTAL IMMUNITY 2

MOTOR VEHICLES—*See*

INSURANCE 5

MULTISTATE BUSINESSES—*See*

TAXATION 1, 3

MUNICIPAL CORPORATIONS—*See*

STATUTES 5

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT—*See*
GAME 1

NEGLIGENCE—*See*
GOVERNMENTAL IMMUNITY 1
PUBLIC TRANSPORTATION 1

NO-FAULT—*See*
INSURANCE 4, 5

NOTES SECURED BY MORTGAGE—*See*
MORTGAGES 2

OFFENSE VARIABLE 1—*See*
SENTENCES 4

OFFENSE VARIABLE 4—*See*
SENTENCES 3

OFFENSE VARIABLE 9—*See*
SENTENCES 5

OFFENSE VARIABLE 13—*See*
SENTENCES 3

OFFENSE VARIABLE 15—*See*
SENTENCES 2

100-MILE RULE FOR DOMICILE CHANGE—*See*
PARENT AND CHILD 1

OPINION TESTIMONY—*See*
COSTS 1

OPPORTUNITY TO PRESENT A DEFENSE—*See*
CRIMINAL LAW 2

ORDERS CHANGING VENUE—*See*
COURTS 1

ORDERS OF GOODS DEFINED—*See*
ACTIONS 3

ORDINANCES—*See*

STATUTES 5

PARENT AND CHILD

CHILD CUSTODY

1. MCL 722.31, which prohibits the parent of a child whose custody is governed by court order from changing the child's legal residence to a location that is more than 100 miles from the child's legal residence without the consent of the other parent or permission of the court, does not apply to parents with sole legal custody. *Brecht v Hendry*, 297 Mich App 732.
2. A trial court considering the request of a parent with sole custody of a minor to move the minor's domicile or residence from Michigan pursuant to MCR 3.211(C)(1) may not consider the factors set forth in *D'Onofrio v D'Onofrio*, 144 NJ Super 200 (1976), or the codification of those factors in MCL 722.31(4); these factors include consideration of the prospective advantages of the move, the custodial parent's motives in seeking the move, the noncustodial parent's motives in resisting the move, and the existence of a realistic opportunity for visitation if the move is allowed; the trial court must exercise its discretion to grant or deny the request under MCR 3.211(C)(1) regardless of the fact that it is unclear how that discretion is to be exercised. *Brecht v Hendry*, 297 Mich App 732.

CHILD SUPPORT

3. When calculating child support obligations, under the Michigan Child Support Formula (MCSF), potential income may be imputed to a parent when he or she is voluntarily unemployed or underemployed or has an unexercised ability to earn income; applying the factors set forth in 2008 MCSF 2.01(G)(2), the trial court must determine whether the parent has an actual ability to earn and reasonable likelihood of earning the potential income before imputing the income and the court's decision must be supported by adequate fact-finding; when the evidence establishes that a parent has declined to receive early social security retirement benefits in order to receive a higher benefit at a later time, that parent has not demonstrated an unexercised ability to earn from which income could be imputed. *Clarke v Clarke*, 297 Mich App 172.

4. Retroactive increases and decreases in child support payments are prohibited, but they are allowed for the period during which there is a pending petition for modification commencing from the date that notice of the petition was given to the payer or recipient of support (MCL 552.603[2]). *Clarke v Clarke*, 297 Mich App 172.
5. A trial court has authority to modify a child support order regarding the federal dependency tax exemption because it is considered part of the child support award; a child support order may be modified upon a showing by the petitioning party that there has been a change in circumstances sufficient to justify the modification. *Clarke v Clarke*, 297 Mich App 172.

PARENTING TIME

6. The Court of Appeals has jurisdiction of an appeal of right from a final judgment or final order of the circuit court; in a domestic-relations action, a final order includes a postjudgment order affecting the custody of a minor; orders denying a motion for a change of custody include those domestic-relations postjudgment orders that affect the custody of the minor, not just those that result in a custody change; a circuit court's order denying a motion to change custody is appealable by right to the Court of Appeals because it affects the custody of a minor (MCR 7.203[A][1], MCR 7.202[6][a][iii]). *Wardell v Hincka*, 297 Mich App 127.

TERMINATION OF PARENTAL RIGHTS

7. Once a statutory ground for termination has been proved, the trial court must find that termination is in the child's best interests before it can terminate parental rights; in deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home; the trial court has a duty to decide the best interests of each child individually; although in most cases it will be in the best interests of each child to keep brothers and sisters together, if keeping the children together is contrary to the best interests of an individual child, the best interests of that child will control; a trial court's failure to explicitly address whether termination is appropriate in light of the child's placement with relatives renders the factual record inadequate to make a

best-interest determination and requires reversal (MCL 712A.19b[5]; MCR 3.977[E][4]). *In re Olive/Metts Minors*, 297 Mich App 35.

8. In a child protective proceeding, reasonable efforts to reunite the child and the family must be made; if the respondent needs accommodation in services, the time for requesting that accommodation is when the court adopts a service plan; failure to timely object or indicate that the services are inadequate results in the issue being unpreserved; while the Department of Human Services has a responsibility to expend reasonable efforts to provide services to secure reunification, the respondent has a commensurate responsibility to participate in the services that are offered (MCL 712A.19a[2]). *In re Frey*, 297 Mich App 242.

PARENTING TIME—*See*

PARENT AND CHILD 6

PARENTS WITH SOLE LEGAL CUSTODY—*See*

PARENT AND CHILD 1, 2

PARTIAL CLOSURE OF TRIAL—*See*

CONSTITUTIONAL LAW 7

PARTIES—*See*

ATTORNEY FEES 2

PASSENGERS IN WHEELCHAIRS—*See*

GOVERNMENTAL IMMUNITY 2

PUBLIC TRANSPORTATION 2, 3, 4

PENALTIES FOR TAX DEFICIENCIES—*See*

TAXATION 4

PERIODS OF LIMITATIONS—*See*

INSURANCE 2

PERSONAL PROPERTY—*See*

TAXATION 6

PERSONAL PROTECTION INSURANCE BENEFITS—*See*

INSURANCE 4, 5

PETITIONS FOR BALLOT QUESTIONS—*See*

ELECTIONS 1

MANDAMUS 1

PLACEMENT WITH RELATIVES IN BEST INTERESTS OF CHILD—*See*

PARENT AND CHILD 7

PLEADING

AMENDMENT OF PLEADINGS

1. *Richard v Schneiderman & Sherman, PC (On Remand)*, 297 Mich App 271.

POINT OF TYPE DEFINED—*See*

ELECTIONS 1

POSSESSES DEFINED—*See*

CONTROLLED SUBSTANCES 1

POWER-OF-SALE CLAUSES—*See*

MORTGAGES 2

PREDICATE OFFENSES FOR HABITUAL-OFFENDER ENHANCEMENTS—*See*

SENTENCES 1

PREEMPTION OF ORDINANCES—*See*

STATUTES 5

PREEMPTION OF STATUTES—*See*

STATUTES 2

PRELIMINARY INJUNCTIONS—*See*

INJUNCTIONS 1

PREREQUISITES FOR CLASS CERTIFICATION—*See*

ACTIONS 1

PRESCRIBED FORMAT FOR REFERENDUM PETITIONS—*See*

ELECTIONS 1

PRETRIAL PROCEDURE

DISCOVERY

1. In the absence of an agreement to accept a letter from counsel in lieu of actual signed answers to interrogatories, the provision of such a letter does not constitute compliance with MCR 2.309(B). *Jilek v Stockson (On Remand)*, 297 Mich App 663.

PREVAILING PARTIES—*See*

ATTORNEY FEES 2

PRIMARY CUSTOMERS—*See*

PUBLIC UTILITIES 2

PRISONERS—*See*

SETTLEMENTS 1, 2

PRO RATA SHARE OF REFUNDS—*See*

PUBLIC UTILITIES 2

PROBABLE CAUSE—*See*

SEARCHES AND SEIZURES 1

PROMISSORY NOTES—*See*

MORTGAGES 2

PROSECUTIONS BROUGHT SELECTIVELY—*See*

CONSTITUTIONAL LAW 4

PROXIMATE CAUSE—*See*

GOVERNMENTAL IMMUNITY 1

PUBLIC EMPLOYMENT RELATIONS ACT—*See*

LABOR RELATIONS 1, 2

PUBLIC SCHOOL EMPLOYEES—*See*

CONSTITUTIONAL LAW 10

PUBLIC SERVICE COMMISSION—*See*

PUBLIC UTILITIES 1

PUBLIC TRANSPORTATION

See, also, GOVERNMENTAL IMMUNITY 2

NEGLIGENCE

1. A plaintiff bus passenger may not recover for injuries

sustained when the bus suddenly stopped, absent evidence of other negligence pertaining to the operation of the bus, because such stops are normal incidents of travel. *Seldon v Suburban Mobility Auth for Regional Transportation*, 297 Mich App 427.

PASSENGERS IN WHEELCHAIRS

2. Regulations promulgated by the United States Department of Transportation to effectuate the purpose of the Americans with Disabilities Act prohibit a transit operator that provides transportation services to the general public from requiring passengers in wheelchairs to use seat belts or shoulder restraints unless the operator requires the same of all passengers; requiring operators to inform passengers in wheelchairs of the availability of seat belts or shoulder restraints when such devices are unavailable to passengers not in wheelchairs is contrary to the tenet that disabled passengers are to be treated the same as able-bodied passengers (42 USC 12101 *et seq*.; 49 CFR 37.1; 49 CFR 37.5). *Seldon v Suburban Mobility Auth for Regional Transportation*, 297 Mich App 427.
3. Although federal regulations state that a public transportation entity's personnel have an obligation to ensure that a passenger with a disability is able to take advantage of the accessibility and safety features on a vehicle, the obligation requires only that the personnel provide assistance with lifts, ramps, and devices to secure a wheelchair and does not require such personnel to advise passengers in wheelchairs that seat belts or shoulder restraints are available (49 CFR, part 37, appendix D, subpart G, § 37.165). *Seldon v Suburban Mobility Auth for Regional Transportation*, 297 Mich App 427.
4. Federal regulations provide that the personnel of public transit operators shall assist individuals with disabilities with the use of securement systems when necessary or upon request but may not place personal restraints on passengers in wheelchairs absent an indication by such a passenger that he or she wishes to use one (49 CFR 37.165[f]). *Seldon v Suburban Mobility Auth for Regional Transportation*, 297 Mich App 427.

PUBLIC UTILITIES

INTERIM RATE INCREASES

1. A utility may self-implement an interim rate increase through equal-percentage increases or decreases applied to

all base rates six months after filing a complete application for a rate change with the Public Service Commission (PSC); the PSC is relegated to issuing a temporary order preventing or delaying the interim increase if there is good cause; the PSC is required to phase in electric rates equal to the cost of providing service to each customer class over a period of five years from the effective date of 2008 PA 286; if a utility self-implements interim rate increases before the PSC issues a final order, the utility must use an equal-percentage surcharge; but in order to fulfill its obligation to phase in cost-based rates, the PSC has the necessary authority to gradually implement cost-based rates through approval of interim varying-percentage rate adjustments; after the five-year phase-in-period, the PSC will be barred from preventing or delaying self-implementation of equal-percentage rate increases except for good cause. *In re Application of Indiana Michigan Power Co*, 297 Mich App 332.

SELF-IMPLEMENTED RATE INCREASES

2. MCL 460.6a(1) states that a utility must refund to customers, with interest, any portion of total revenues collected under a self-implemented plan that exceed the total that would have been produced by the rates or charges subsequently ordered by the Public Service Commission (PSC) in its final order; the PSC must allocate that refund among primary customers based on their pro rata share of the total revenue collected through the applicable increase; the language requiring a refund to primary customers based on their pro rata share of the revenues collected can be read as requiring that all of the primary customers together be given a refund based on all of the primary customers' pro rata share of the total revenue collected. *In re Detroit Edison Co Application*, 297 Mich App 377.

RAPE—*See*

CRIMINAL LAW 3

RATE INCREASES—*See*

PUBLIC UTILITIES 1, 2

REASONABLE CAUSE FOR WAIVING PENALTIES—*See*

TAXATION 4

REASONABLE EFFORTS TO REUNITE CHILDREN AND FAMILIES—*See*
PARENT AND CHILD 8
REASONABLE NOTICE OF HEARING—*See*
SANCTIONS 3
REASONABLENESS OF ATTORNEY FEES—*See*
SANCTIONS 1
REASONABLENESS OF HOURS BILLED—*See*
ATTORNEY FEES 3
RECEIPTS FROM LEASES OF TANGIBLE PERSONAL PROPERTY—*See*
TAXATION 6
RECOVERY OF RESTITUTION BY DEPARTMENT OF CORRECTIONS—*See*
SETTLEMENTS 1, 2
REFERENDUM PETITIONS—*See*
ELECTIONS 1
REFUNDS OF RATE INCREASES—*See*
PUBLIC UTILITIES 2
REGISTRY IDENTIFICATION CARDS FOR MEDICAL MARIJUANA—*See*
CONTROLLED SUBSTANCES 1
REJECTING PARTIES—*See*
ATTORNEY FEES 2
REMAND—*See*
APPEAL 2
RENTAL OF TANGIBLE PERSONAL PROPERTY—*See*
TAXATION 6
REOPENING OF CLAIMS—*See*
INSURANCE 1

REPUBLICATION OF LAWS AFFECTED BY CONSTITUTIONAL AMENDMENTS—*See*
CONSTITUTIONAL LAW 1
REQUIRED USE OF SAFETY DEVICES—*See*
PUBLIC TRANSPORTATION 2
RESIDENCE OF CHILD—*See*
PARENT AND CHILD 1
RESIDENT ALIENS—*See*
IMMIGRATION 1
RESTITUTION—*See*
SETTLEMENTS 1, 2
RETIREE HEALTH-CARE BENEFITS—*See*
CONSTITUTIONAL LAW 10
RETROACTIVE MODIFICATION OF CHILD SUPPORT—*See*
PARENT AND CHILD 4
REUNITING CHILDREN AND FAMILIES—*See*
PARENT AND CHILD 8
REVISIONS OF CONSTITUTION—*See*
CONSTITUTIONAL LAW 1
RIGHT TO BEAR ARMS—*See*
WEAPONS 1
RIGHT TO CONFRONTATION—*See*
CRIMINAL LAW 1
RIGHT TO PUBLIC TRIAL—*See*
CONSTITUTIONAL LAW 7
RIPENESS—*See*
ACTIONS 4
MANDAMUS 1
ROLL CALL VOTES—*See*
STATUTES 4

RULEMAKING—*See*

ADMINISTRATIVE LAW 1

CONSTITUTIONAL LAW 8

RULES OF EVIDENCE—*See*

CRIMINAL LAW 2

S CORPORATIONS—*See*

TAXATION 5

SAFETY DEVICES—*See*

PUBLIC TRANSPORTATION 2, 3

SALES REPRESENTATIVES COMMISSION ACT—*See*

ACTIONS 3

SANCTIONS

ATTORNEY FEES

1. An award of attorney fees as sanctions under MCR 2.114(E) must be reasonable and the court must consider the factors set forth in MRPC 1.5(a) when making the award; the court may take judicial notice of facts that can be accurately determined by sources of unquestionable reliability, for example, statistics; the fees customarily charged in the locality can be established by empirical data found in surveys like the State Bar of Michigan Economics of Law Practice Survey; the burden of proving the reasonableness of the requested fees is on the requesting party and the court has discretion to order sanctions in an amount less than that which was requested. *Vittiglio v Vittiglio*, 297 Mich App 391.

DOCUMENTS SUBJECT TO VERIFICATION

2. MCR 2.114(D) provides that the signature of an attorney or a party constitutes a certification by the signer (1) that he or she has read the document, to the best of his or her knowledge, information, and belief formed after reasonable inquiry, (2) that the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and (3) that the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; the filing of a signed document that is not well grounded in

fact and law subjects the filer to sanctions under MCR 2.114(E). *Vittiglio v Vittiglio*, 297 Mich App 391.

HEARINGS

3. A party must receive some type of reasonable notice and an opportunity to be heard before sanctions may be imposed under MCR 2.114; the court is not required to hold a separate hearing if it is satisfied that it can sufficiently decide the issue of sanctions on the evidence before it. *Vittiglio v Vittiglio*, 297 Mich App 391.

SCHOOL EMPLOYEES—*See*

CONSTITUTIONAL LAW 10

SCORING OF OFFENSE VARIABLES—*See*

SENTENCES 2

SEARCHES AND SEIZURES

MEDICAL MARIJUANA

1. The possession, manufacture, use, creation, and delivery of marijuana are still illegal in Michigan after the enactment of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*.; the MMMA did not abrogate state criminal prohibitions of the manufacturing of marijuana, but merely provided a procedure by which seriously ill individuals using marijuana for specified medical purposes can be identified and protected from prosecution under state law; to establish probable cause to issue a search warrant, the supporting affidavit does not have to provide facts from which a magistrate could conclude that a suspect's marijuana-related activities are specifically not legal under the MMMA. *People v Brown*, 297 Mich App 670.

SECOND AMENDMENT—*See*

WEAPONS 1

SECUREMENT SYSTEMS FOR PASSENGERS—*See*

PUBLIC TRANSPORTATION 4

SELECTIVE CRIMINAL PROSECUTIONS—*See*

CONSTITUTIONAL LAW 4

SELF-IMPLEMENTED RATE INCREASES—*See*

PUBLIC UTILITIES 1, 2

SENTENCES

HABITUAL-OFFENDER ENHANCEMENTS

1. Sentence enhancement is permitted under MCL 769.11(1) if a defendant has been convicted of two or more felonies or attempts to commit felonies, and that enhancement is allowed on the basis of prior felony convictions without regard to the sentence imposed for the prior felony convictions; an adult felony conviction that results in a juvenile sentence may be used as one of the predicate felony offenses for sentencing as an habitual offender. *People v Jones*, 297 Mich App 80.

SENTENCING GUIDELINES

2. Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable; offense variable 15 (aggravated controlled substance offenses) does not provide otherwise and, therefore, only conduct related to and forming the basis of the sentencing offense may be examined when assessing points under this variable; conduct that forms the basis of charges that have been dismissed may not be reviewed or considered when assessing points under offense variable 15, regardless of the sequence in which the conduct transpired (MCL 777.45). *People v Gray*, 297 Mich App 22.
3. *People v Earl*, 297 Mich App 104.
4. Offense variable 1 (OV 1) considers the aggravated use of a weapon; 20 points must be assessed under OV 1 when a victim was subjected or exposed to a harmful biological substance or device, a harmful chemical substance or device, a harmful radioactive material or device, an incendiary device, or an explosive device; a weapon is an instrument or device used for attack or defense in a fight or anything used against an opponent, adversary, or victim; a substance must be used as a weapon in order for points to be assessed under OV 1 (MCL 777.31[1][b]). *People v Ball*, 297 Mich App 121.
5. Under the statutory sentencing guidelines, a trial court must assess 25 points for offense variable (OV) 9 when there were 10 or more victims who were placed in danger of physical injury or death, or 20 or more victims who were placed in danger of property loss; the community as a whole suffers from any crime, but it is an

indirect victim, and may not be counted as victim for the purposes of OV 9. *People v Carrigan*, 297 Mich App 513.

SENTENCING GUIDELINES—*See*

SENTENCES 2, 3, 4, 5

SEPARATION OF POWERS—*See*

CONSTITUTIONAL LAW 8

SETTLEMENT AGREEMENTS—*See*

DIVORCE 1, 2

SETTLEMENTS

PRISONERS

1. Under MCL 791.220h, if a prisoner is ordered to pay restitution to the victim of a crime and the Department of Corrections (DOC) receives a copy of the restitution order from the court, the DOC must deduct fifty percent of the funds received by the prisoner in a month over $50 for payment of the restitution; any funds owed by the DOC, or to be paid on behalf of one or more of its employees to satisfy a judgment or settlement to a person for a claim that arose while the person was incarcerated, shall be paid to satisfy any orders of restitution imposed on the claimant of which the DOC has a record; the DOC has the responsibility to withhold money from such a settlement and forward to any victim the restitution that had been ordered, but only if a copy of the restitution order had been sent to the DOC; under MCL 791.220h(2), the proceeds from a judgment or a settlement in litigation against the DOC must first be used to satisfy any outstanding restitution order filed with DOC before proceeds may be distributed to a prisoner. *Neal v Dep't of Corrections*, 297 Mich App 518.
2. Under MCL 600.5511, any damage award to a prisoner arising out of a claim against the Department of Corrections (DOC) or its employees must first be utilized to pay any outstanding restitution, costs and fees, or other assessments owed to the jurisdiction housing the prisoner; the DOC may not disburse any funds to any plaintiff class member until there has been full payment of all pending restitution orders, costs, and fees as required by MCL 600.5511(2); the DOC must seek to recover any payments to any particular class member if

a disbursement was made before all pending restitution orders, costs, and fees were paid. *Neal v Dep't of Corrections*, 297 Mich App 518.

SEX OFFENDERS REGISTRATION ACT—*See*

CRIMINAL LAW 1

SHERIFFS AND CONSTABLES

LAW ENFORCEMENT POWERS

1. Although a sheriff's power to hire, fire, and discipline is not absolute, the matter of which of the sheriff's deputies shall be delegated the powers of law enforcement entrusted to the sheriff by the Constitution is a matter entirely within the sheriff's discretion and inherent in the nature of the office, and may not be infringed on by the Legislature nor delegated to a third party (Const 1963, art 7, § 4). *Leelanau County Sheriff v Kiessel*, 297 Mich App 285.

VETERAN'S PREFERENCE ACT

2. The veteran's preference act protects deputy sheriffs, other than the first deputy, from termination absent cause, notice, and a hearing (MCL 35.401 *et seq*., MCL 51.70). *Leelanau County Sheriff v Kiessel*, 297 Mich App 285.

SINGLE BUSINESS TAX—*See*

TAXATION 5

SIXTH AMENDMENT—*See*

CONSTITUTIONAL LAW 6, 7

CRIMINAL LAW 1, 2

SOCIAL SECURITY RETIREMENT BENEFITS—*See*

PARENT AND CHILD 3

SOCIAL WELFARE ACT—*See*

ADMINISTRATIVE LAW 1

SOLE LEGAL CUSTODY—*See*

PARENT AND CHILD 1, 2

SPOUSAL SUPPORT—*See*

DIVORCE 1

STANDING—*See*

ACTIONS 4

MANDAMUS 1

STATUTE OF FRAUDS—*See*

DIVORCE 2

STATUTES

See, also, CONSTITUTIONAL LAW 9

ENFORCEMENT OF STATUTES

1. The fact that the violation of a law is prevalent does not mean that enforcement of the law is absurd. *In re Tiemann*, 297 Mich App 250.

FEDERAL PREEMPTION

2. A federal statute will not preempt a state statute unless Congress clearly manifested an intent to do so; impossibility conflict preemption occurs when compliance with both federal and state regulations is a physical impossibility; obstacle conflict preemption occurs when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; it is not physically impossible to comply with logically inconsistent statutes when a person can simply refrain from doing the activity that one statute purports to permit and the other statute purports to proscribe; to determine whether a state statute stands as an obstacle to the full purposes and objectives of Congress, the purposes and objectives of the state statute at issue must also be identified. *Ter Beek v City of Wyoming*, 297 Mich App 446.

3. Section 4(a) of the Michigan Medical Marihuana Act, MCL 333.26424(a), which grants immunity from prosecution to qualified registered medical-marijuana users for the use, manufacture, and cultivation of marijuana for medical purposes, is not preempted by the federal controlled substances act, 21 USC 801 *et seq*., which prohibits all uses of marijuana under 21 USC 841(a)(1), because it only grants immunity from state prosecution and therefore does not stand as an obstacle to the accomplishment and execution of the full purposes and objective of Congress. *Ter Beek v City of Wyoming*, 297 Mich App 446.

IMMEDIATE EFFECT

4. Article 4, § 27 of the Michigan Constitution provides that the Legislature may give immediate effect to acts by a 2/3 vote of the members elected to and serving in each house but the Constitution does not require a roll call vote before giving an act immediate effect; under Const 1963, art 4, § 18 each house of the Legislature is required to keep a journal of its proceedings, including the record of the vote and the name of the members of either house voting on any question shall be entered in the journal at the request of 1/5 of the members present; the House has discretion to formulate its own rules regarding the method for obtaining a 1/5 vote for a roll call vote; the official House and Senate Journals are conclusive evidence of those bodies' proceedings and when no evidence to the contrary appears in the journal the propriety of the proceedings is presumed; parol evidence may not be used to contradict the journals and to show that the Legislature violated the Constitution when enacting a statute; the plain language of Const 1963, art 4, § 27 does not specify that a roll call vote is required before giving an act immediate effect. *Hammel v Speaker of the House of Representatives*, 297 Mich App 641.

MUNICIPAL CORPORATIONS

5. A city ordinance that purports to prohibit what a state statute permits is void; a state statute preempts regulation by an inferior government when the local regulation directly conflicts with the statute or when the statute completely occupies the regulatory field; a direct conflict exists when the local regulation prohibits what the statute permits; the Michigan Medical Marihuana Act, which grants immunity from prosecution to qualified, registered medical-marijuana users for the use, manufacture, and cultivation of marijuana for medical purposes, preempts a local ordinance that criminalizes all uses of marijuana through its incorporation of the federal controlled substances act (MCL 333.26421 *et seq*.; 21 USC 801 *et seq*.). *Ter Beek v City of Wyoming*, 297 Mich App 446.

STUN GUNS—*See*

WEAPONS 1

SUBSTANTIAL COMPLIANCE WITH PETITION REQUIREMENTS—*See*

ELECTIONS 1

SUBSTANTIVE DUE PROCESS—*See*

CONSTITUTIONAL LAW 10

SUDDEN STOPPING OF BUSES—*See*

PUBLIC TRANSPORTATION 1

SUFFICIENCY OF AFFIDAVITS—*See*

SEARCHES AND SEIZURES 1

SUMMARY DISPOSITION OF GOVERNMENTAL IMMUNITY CLAIM—*See*

APPEAL 1

SYNOPSIS ON REFERENDUM PETITIONS OF LEGISLATION INVOLVED—*See*

ELECTIONS 1

TAKING CLAUSE—*See*

CONSTITUTIONAL LAW 10, 11

TAKING OF BEAR WITHOUT A FIREARM, CROSSBOW, OR BOW AND ARROW—*See*

GAME 1

TANGIBLE PERSONAL PROPERTY—*See*

TAXATION 6

TASERS—*See*

WEAPONS 1

TAXATION

INCOME TAX

1. Under the unitary business principle, for a business or individual to exercise multistate apportionment of income, there must be some sharing or exchange of value not capable of precise identification or measurement—beyond the mere flow of funds arising out of a passive investment or a distinct business operation—that ren-

ders formula apportionment a reasonable method of taxation; Michigan law does not allow separate entities to be treated as a unitary business in the absence of some common ownership at the entity level, and being owned by the same individual taxpayers is insufficient to trigger this relationship requirement. *Wheeler Estate v Dep't of Treasury*, 297 Mich App 411.

2. Any taxpayer having income from a business activity that is taxable both within Michigan and within any foreign country is required to apportion his or her net income; when the language used to define the applicable statutory apportionment factors makes clear that there is no specific prohibition on apportioning business income through the addition of international apportionment factors, the Income Tax Act does not exclude foreign entities from consideration under the unitary business principle for apportionment purposes (MCL 206.20, MCL 206.103, MCL 206.115, and MCL 206.121). *Wheeler Estate v Dep't of Treasury*, 297 Mich App 411.
3. In determining whether two businesses are unitary for purposes of the Income Tax Act, a court must consider (1) economic realities, (2) functional integration, (3) centralized management, (4) economies of scale, and (5) substantial mutual interdependence; consideration of economic realities addresses whether the regularly conducted activities of the businesses in question are related—there is no requirement, however, that the unity of businesses be the result of collaborative development; consideration of functional integration concerns the extent to which business functions are blended to promote a unitary relationship; consideration of centralized management requires consideration of whether management of the businesses was centralized across the potentially unitary business—complete management, however, is not required; consideration of economies of scale examines the presence of economies of scale—evidence regarding bulk purchasing or improved resource allocation, however, is not necessary to demonstrate the presence of economies of scale; consideration of substantial mutual interdependence examines whether such interdependence exists (MCL 206.1 *et seq*.) *Wheeler Estate v Dep't of Treasury*, 297 Mich App 411.
4. Under MCL 205.23(3), if any part of a tax deficiency is the result of negligence, a penalty of $10 or 10 percent of the deficiency, whichever is greater, plus interest is

added to the deficiency; however, the Department of Treasury must waive this penalty if the taxpayer demonstrates that the tax deficiency resulted from reasonable cause; reasonable cause is generally deemed to exist when there is an honest difference of opinion with regard to the effect or application of law. *Wheeler Estate v Dep't of Treasury*, 297 Mich App 411.

SINGLE BUSINESS TAX

5. *TMW Enterprises Inc v Dep't of Treasury*, 297 Mich App 590.

USE TAX

6. *Devonair Enterprises, LLC v Dep't of Treasury*, 297 Mich App 90.

TEACHERS—*See*

CONSTITUTIONAL LAW 10

TERMINATION OF EMPLOYMENT—*See*

SHERIFFS AND CONSTABLES 2

TERMINATION OF PARENTAL RIGHTS—*See*

PARENT AND CHILD 7, 8

THIRD-DEGREE CRIMINAL SEXUAL CONDUCT—*See*

CRIMINAL LAW 3

TOLLING OF LIMITATIONS PERIODS—*See*

INSURANCE 2

TRIAL COURTS—*See*

APPEAL 2

TRIAL STRATEGY—*See*

CONSTITUTIONAL LAW 6

UNCONSCIONABILITY—*See*

CONTRACTS 1

UNDERPAYMENT OF FIRE INSURANCE CLAIMS—*See*

INSURANCE 3

UNILATERAL IMPLEMENTATIONS OF LAST BEST OFFER IN COLLECTIVE BARGAINING—*See*
LABOR RELATIONS 2
UNIONS—*See*
ACTIONS 4
UNITARY BUSINESS PRINCIPLE—*See*
TAXATION 1, 2, 3
UNLAWFUL TAKING OF MOTOR VEHICLES—*See*
INSURANCE 5
USE TAX—*See*
TAXATION 6
VAGUENESS OF STATUTES—*See*
CONSTITUTIONAL LAW 9
VENUE—*See*
COURTS 1
VERIFICATION OF PLEADINGS—*See*
SANCTIONS 1, 2, 3
VETERAN'S PREFERENCE ACT—*See*
SHERIFFS AND CONSTABLES 2
VICTIMS—*See*
SENTENCES 5
SETTLEMENTS 1, 2
VOID FOR VAGUENESS—*See*
CONSTITUTIONAL LAW 9
WAIVER OF PENALTIES—*See*
TAXATION 4
WEAPON DEFINED—*See*
SENTENCES 4
WEAPONS
CONSTITUTIONAL LAW
1. The Second Amendment of the United States Constitu-

tion protects the right of the people to keep and bear arms and is equivalent to Const 1963, art 1, § 6, which guarantees the right of every person to keep and bear arms for the defense of the person and the state; Second Amendment protections extend to all items that constitute bearable arms that were in common use at the time the amendment was written, as well as those that were not in existence at that time, such as handguns; weapons that are not typically possessed by law-abiding citizens for lawful purposes are not protected, and the carrying of dangerous and unusual weapons has historically been prohibited; Tasers and stun guns constitute arms for purposes of the Michigan and United States Constitutions, and a complete ban of ownership and possession of them violates the state and federal constitutions (MCL 750.224a, as amended by 2006 PA 457). *People v Yanna*, 297 Mich App 137.

WELL GROUNDED IN FACT DEFINED—*See*

SANCTIONS 2

WHEELCHAIRS—*See*

PUBLIC TRANSPORTATION 2, 3

WIDESPREAD VIOLATIONS OF STATUTES—*See*

STATUTES 1

WILD ANIMALS—*See*

GAME 1

WORDS AND PHRASES—*See*

ACTIONS 3

CONTROLLED SUBSTANCES 1

ELECTIONS 1

GAME 1

GOVERNMENTAL IMMUNITY 1

INSURANCE 5